

THE DYNAMICS OF ISSUE ATTENTION ON THE UNITED STATES SUPREME COURT

A Dissertation

by

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Submitted to the Office of Graduate and Professional Studies of
Texas A&M University

in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

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August 2018

Major Subject: Political Science

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ABSTRACT

Throughout history, the United States Supreme Court has served as a major player in shaping the character and direction of public policy through the decisions it hands down. The issues that have garnered the Court's attention have also changed over time, suggesting that the type of cases that receive certiorari fluctuate according to judicial preferences. Most research on certiorari has highlighted the importance of this process for understanding judicial decision-making, especially in regards to which cases are selected for review. But, we know less about the importance of issues in the agenda-setting process, and why issues, not specific cases, explain agenda-setting. This project brings together a theoretical framework that focuses on the influence of macro-level considerations on certiorari with a methodological emphasis on explaining dynamic agenda-setting.

The macro-political theory of agenda setting produces three predictions about the dynamics of issue attention on the Supreme Court. First, the Supreme Court's issue attention should shift toward policy domains over which Republicans exert greater issue ownership as the membership of the Court becomes more conservative, and, conversely, the Court should pay greater attention to policy domains over which Democrats have stronger issue ownership as the Court becomes more liberal. Second, the Court's issue attention should follow public perceptions of problems in the political, economic, or social environment, leading the Court to take more cases in issue areas where the American people identify important public problems. Finally, the Court's issue agenda should respond to changes in the political, economic and social environment that produce changes in the volume of litigation activity in particular policy domains, influencing the composition of the set of cases from which the Court constructs its docket and, therefore, its issue agenda.

Another contribution of this dissertation is the introduction of compositional dependent variable models to judicial politics. This methodology examines the trade-off relationships that shape the Supreme Court's agenda over time, with the underlying theory that the composition of the agenda reflects the relative importance of the Court's partisan priorities. Using this approach, the data indicate that the partisan composition of the Court alters the policy preferences represented

on the judicial agenda and that there are trade-off relationships that have been largely masked by exploring the ebb and flow of issue attention across different issue areas separately.

The results indicate that issue attention by the U.S. Supreme Court is not merely the result of the incidental aggregation of the policy domains in which individual cases are situated. The Court's attention to different issues is systematically associated with macro-political dynamics in the ideological orientations of the Court's members and the political environment. This mirrors patterns of aggregate issue attention in the elected branches of national government and highlight a political economy of judicial issue attention. Further, the data indicate that partisanship and ideology have differential effects on the types of issues the justices place on their agenda, indicating that the related concepts need to be considered independently in more research in judicial politics.

DEDICATION

To Craig L. Brians,
I can sure smell the rain.

ACKNOWLEDGMENTS

My biggest debt of gratitude belongs to my wonderful advisor, Joe Ura. From day one, Joe has gently, but consistently encouraged me to ask questions, trust my instincts, read more, to not be afraid to call when there is a fire, and work on rearranging the fish. Through mentoring, friendship, collaboration, patience, cajoling, exasperation, and unfailing faith, Joe has help shape me into the scholar I am today. Joe has been an excellent advisor, constantly demonstrating that the best mentors are supportive and sometimes silly, the best educators will always expect just a bit more of their students than their students expect of themselves, and the best scholars are open to ideas and always willing to pursue them. Joe, you inspire and encourage me more than you probably realize.

This project also benefitted from the advice of a truly wonderul committee. Paul Kellstedt, Matt Hall, Scott Cook, and Kirby Goidel have been constant sources of feedback and support on this project, as well as being wonderful mentors in this profession. Paul, you deserve so much thanks and appreciation for getting me out of my comfort zone and pushing me to grow and mature as a person and scholar from day one. You were always there when I needed to ask your opinion on different projects, how to handle office hours, the way to respond to student e-mails, and I know I can always count on your for a great restaurant recommendation. And thank you for teaching me to have faith in my skills as a methodologist, and bringing me to Ann Arbor to continue to develop those skills. Matt deserves special acknowledgement for taking me on as a student despite having no institutional obligation to me. Matt, I am so grateful for your mentorship and ruthless, but honest and constructive feedback on research; as well as your countless words of wisdom on negotiating the job market. I am excited to begin the next phase of our relationship as co-authors! Scott, thank you for jumping on board with this dissertation, even though it is so far from your substantive research interests. Your perspective has helped me understand how to write more clearly and directly, and I am so thankful to have had the opportunity to learn how to analyze and present data from you. And Kirby, thank you for making me think about broader questions and

real world considerations.

Graduate school would have been a lot less survivable without the support of my classmates and colleagues. I honestly don't know where I would be without the five years of lake walks, lunches, venting sessions in each other's office, and endless support from Kathryn Haglin. We came in together, and even when it seemed impossible, we helped each other finish together. I owe special gratitude to Nick Conway, who started as a mentor and has become an incredible friend. Nick and I bonded over a love of law and courts, but without Nick, I know my research would be less clear, my methods less well explained, and my sanity would be long gone. Molly Berkemeier was the best officemate that I could have asked for. We got each other through prelims, talked about puppies and travel when we were procrastinating, and used each other as sounding boards. I also need to thank Soren Jordan, Grant Ferguson, and Clay Webb for welcoming me to A&M with open arms and introducing me to both Aggie traditions and life after grad school. Garrett Vande Kamp, Sam Zuhlke, Liana Gonzales, Thiago Silva, Andy Philips, Flavio Souza, Josh Alley, Austin Mitchell, and Morgan Winkler offered wonderful feedback, creative ideas, and patience as I hashed out various ideas along the way. This list is by no means comprehensive, but thank you to the entire graduate program at Texas A&M for support and encouragement, and your never-ending willingness to eat anything I baked.

I have also benefitted from the opportunity to immerse myself in training, networking and socialization outside of Texas A&M. To my cohort-mates and students at ICPSR, thank you for pushing me to develop my methodological skills and figure out how to explain them to others. And I am thoroughly indebted to my 2017 EITM cohort and faculty mentors for giving me the confidence to admit when I don't know, ask for help, and constantly think through the theoretical implications of my research. And the Mike Munger and the Buchanan Camp, thank you for introducing me to a whole new world of scholarship in the mountains of Utah. Conferences will forever be more fun because of all of you!

Finally, this project, not to mention the last five years of graduate school, would not have been possible without the support of my friends and family in the "real world." My friends may not

have always understood (or cared) what I was working on, but they have cheered me on anyway. I am especially grateful to my amazing husband, Jeff Merrill. You never once blinked an eye when I said that I wanted to pursue a Ph.D., and I know that your eyes tend to glaze over when I start getting into the nitty gritty of my research or what I want to talk about during lectures in my classes, but I cannot tell you how much I appreciate you asking about how course prep is going, how the research is coming along, and how my day was. You have been with me through all the highs and lows, and you're still here! I love you so much and wouldn't have made it without you. Of course I need to thank my sweet Henry. The pup who has my heart, makes sure I get outside at least a couple times a day, and gives the best cuddles at the end of a long day. There really is no cure for a bad day quite like coming home to your wiggly butt and sneezes of excitement. Susannah Netherland has always been there to make me laugh, read things that are not about the Supreme Court, swap recipes, and read countless drafts. Maggie Robertson, Rachel Kalil, and every member of StriveForwardNation, thank you for creating a productive community of positivity and support, and helping me channel my frustration and stress into a healthy outlet.

I was fortunate to grow up in a household where learning was the number one priority. My mom and dad filled our house with books of all kinds, and never passed up the opportunity to take my sisters and I to a museum or battlefield or historical site. We were taught to always ask questions and constantly pursue knowledge. Watching Jeopardy with my family can actually turn into a bit of a bloodbath because we are all trying to answer the question first and prove the others wrong. Mom and Dad, thank you for letting us dream big and chase after our crazy dreams. Thank you for not batting an eye when I told you I was pursuing my Ph.D., even though we all knew it would lead to more moments like when I forgot how to explain the Triple Entente. Thank you for listening to me vent my frustrations about the slow progress of my research, but for also reminding me that I had to keep going, especially when a deadline was looming. Your constant support, tough love, shoulder to cry on, and desire for me to do nothing more than reach my potential helped get me where I am today. And you both should be thrilled that we are moving closer! Thank you for turning me into the kind of person who will always ask “why” and continue to learn.

This dissertation is dedicated to my undergraduate advisor, Craig L. Brians. Dr. Brians, you taught me to never underestimate the value of a gerund, or trebuchet. In all seriousness, I would not be here without your never-ending support and uncanny ability to see potential in people before they realized it themselves. You taught me so much, but the most important thing is there is no reason to ever believe that you are limited in anyway. And, that it is important to smile, laugh, and have fun with what you are doing. I loved knowing I could always count on you for a great conversation about research, life, puppies, dreams, faith, music, or bad jokes. I very firmly believe that you have been my guardian angel during this whole Ph.D. adventure. There have been times over the past five years where I have wanted nothing more than to ask your advice ... and I still do. Thank you for believing in me more than I believed in myself and encouraging me to get out of my comfort zone. And, Dr. Jessica Folkart, thank you for welcoming me into your wonderful family and letting me share my successes and struggles throughout graduate school. I am beyond thankful for the unfailing faith and support that you both placed in me. You have given me more than you'll ever know, and helped me become the scholar and the person I am today.

CONTRIBUTORS AND FUNDING SOURCES

Contributors

This work was supported by a dissertation committee consisting of Professor Joe Ura [advisor] and Paul Kellstedt and Scott Cook of the Department of Political Science and Professor Matt Hall of the Department of Political Science at the University of Notre Dame and Professor Kirby Goidel of the Department of Communication.

The data analyzed for Chapters 2, 3, and 4 was provided by the Supreme Court Database, the Comparative Agendas Project, the Congressional Bills Project, and Professors Andrew Martin and Kevin Quinn of the University of Michigan. The statistical package used to analyze the data in Chapter 4 was created by Professor Andrew Q. Philips of the University of Colorado, Boulder, Professor Amanda Rutherford of Indiana University, and Professor Guy Whitten of Texas A&M University.

All other work conducted for the dissertation was completed by the student independently.

Funding Sources

Graduate study was supported by a fellowship from Texas A&M University and the Summer-time Advancement for Research dissertation award from the College of Liberal Arts at Texas A&M University.

TABLE OF CONTENTS

	Page
ABSTRACT	ii
DEDICATION	iv
ACKNOWLEDGMENTS	v
CONTRIBUTORS AND FUNDING SOURCES	ix
TABLE OF CONTENTS	x
LIST OF FIGURES	xii
LIST OF TABLES	xiii
1. INTRODUCTION AND LITERATURE REVIEW	1
1.1 Existing Work on Certiorari and Agenda Setting on the U.S. Supreme Court	3
1.1.1 A Brief Overview of the Certiorari Process	3
1.1.2 Case Supply to the Supreme Court	5
1.2 Theoretical and Empirical Limitations and Unsolved Puzzles	7
1.3 Theoretical Goals of the Dissertation	10
1.4 Outline	12
2. SELECTING ON THE ECONOMY? ECONOMIC PERFORMANCE AND ISSUE AT- TENTION ON THE U.S. SUPREME COURT	14
2.1 Introduction	14
2.2 Agenda-Setting and Issue Dynamics on the Supreme Court	17
2.3 The Political Economy of Judging	21
2.4 A Theory of Issue Attention, Economic Conditions, and Judicial Decision-Making ..	24
2.5 Estimation	32
2.6 Results	33
2.7 Discussion and Conclusions	36
3. IT'S TEMPERMENTAL: ATTENTION TO CRIMINAL PROCEDURE ON THE U.S. SUPREME COURT	40
3.1 Dynamic Agenda-Setting on the Supreme Court	43
3.2 Understanding the Role of the Supreme Court in Shaping the Criminal Justice System	46
3.3 A Theory of Temporal Issue Attention	53

3.4	Data and Methods	56
3.5	Results	61
3.6	Conclusions.....	64
4.	PIECING IT ALL TOGETHER: UNDERSTANDING DYNAMIC ISSUE ATTENTION ON THE U.S. SUPREME COURT	66
4.1	Introduction.....	66
4.2	A Brief Overview of the Certiorari Process.....	69
4.3	Issue Ownership and Agenda Setting on the Supreme Court	71
4.4	A Partisan Theory of Supreme Court Decision-Making	75
4.5	Data and Methods	80
4.6	Results	83
4.7	Conclusions and Future Directions.....	90
5.	CONCLUSIONS, IMPLICATIONS, AND FUTURE WORK	92
	REFERENCES	97

LIST OF FIGURES

FIGURE	Page
1.1 The External Influences on Supreme Court Issue Attention	12
2.1 Comparing the proportion of respondents who identify the economy as the “Most Important Problem” facing the nation with the proportion of economic cases on the Supreme Court agenda.	29
2.2 Top panel: Annual percent change in unemployment (solid line), inflation (dashed line), and GDP (dotted line). Bottom panel: Annual percent change in macroeconomic indicators compared to the number of economic cases on the Supreme Court’s agenda.	31
3.1 Responses to Gallup’s “Most Important Problem” Question identifying crime as the most salient issue.	53
3.2 Comparing the proportion of respondents who identify law and crime as the “Most Important Problem” facing the nation with the proportion of criminal procedure cases on the Supreme Court agenda.	58
3.3 Comparing the national crime rate per 100,000 population to the number of criminal procedure cases on the Supreme Court agenda	59
3.4 Comparing the number of crime-related bills passed by Congress to the number of criminal procedure cases on the Supreme Court agenda	60
4.1 The proportion of cases on the Supreme Court’s agenda in the four issue areas. The top left panel and top right panel indicate the proportion of criminal procedure cases and civil rights cases, respectively. The bottom left and bottom right panels indicate the proportion of economic cases and judicial power cases, respectively. The vertical gray lines indicate when a Republican president appointed a new justice.	79
4.2 Effects of an Increase in the Proportion of Republican-Appointed Justices on the Supreme Court’s Agenda–Partisanship	88
4.3 Effects of an Increase in the Proportion of Republican-Appointed Justices on the Supreme Court’s Agenda–Ideology	89

LIST OF TABLES

TABLE		Page
2.1	Poisson Regression Model of the Number of Economic Cases on the Supreme Court Agenda, 1952-2015. * = p -value ≤ 0.05 ; one-tailed tests.	33
2.2	Poisson Regression Model of the Number of Economic Cases on the Supreme Court Agenda, 1978-2015. * = p -value ≤ 0.05 ; one-tailed tests. Standard errors in parentheses.	35
3.1	Poisson Regression Model of the Number of Criminal Procedure Cases on the Supreme Court Agenda, 1960-2015. * = p -value ≤ 0.10 ** = p -value ≤ 0.05 ; one-tailed tests. Clustered standard errors in parentheses.	62
4.1	Estimated Short-Run and Long-Run Effects of Partisanship Variables on Supreme Court Agenda Composition.	84
4.2	Estimated Short-Run and Long-Run Effects of Ideology Variables on Supreme Court Agenda Composition.	85

1. INTRODUCTION AND LITERATURE REVIEW

A United States Supreme Court justice was quoted saying “You know, they say that the British acquired the empire in a fit of absentmindedness, and speaking for myself, I think that is the way we create our own agenda” (Perry, 1991, p.1). While this paints a rather bleak picture of how the justices of the Supreme Court choose cases, it is likely exaggeration brought about by the sheer number of cases the Court chooses between in any term. Most justices acknowledge that the process of setting their agenda and choosing between cases is of paramount importance to the work of the Court. Justice Brennan called it “second to none in importance,” (Brennan, 1972) while Justice Marshall remarked that the power to not decide a case is “among the most important things done by the Supreme Court” (Marshall and Tushnet, 2001, p.1737). These different perspectives on the agenda-setting process point to the importance of understanding how justices adjudicate between the thousands of cases petitioned to them each year for review.

Throughout history, the United States Supreme Court has served as a major player in shaping the character and direction of public policy through the decisions it hands down. The issues that have garnered the Court’s attention have also changed over time, suggesting that the type of cases that receive certiorari fluctuate according to judicial preferences. While a great deal of attention has been paid to which cases are selected for review and what makes a case “cert-worthy”(i.e., Black and Owens, 2009; Caldeira and Wright, 1988; Caldeira, Wright and Zorn, 1999; Collins, 2008; Hall and Ura, 2015; Hammond, Bonneau and Sheehan, 2005; Harvey and Friedman, 2009; McGuire 1995; McGuire and Caldeira, 1993; Perry, 1991; Sheehan, Mishler and Songer, 1992; Soger and Sheehan, 1993; Tanenhaus et al., 1963; Ulmer, 1978, 1984), less attention has been given to the underlying issues that capture the Court’s attention. In other words, most research has focused on the micro-level approach to certiorari, in which the cases themselves matter, with less attention given to a more macro-level approach in which it is the issue, not a specific case. McGuire and Palmer (1995, 1995), in their examination of issue fluidity on the Supreme Court, lay the foundation for understanding the importance of the issues the Court chooses to address in

specific cases.

As we build an understanding of these case-centric, micro-political explanations of Supreme Court case selection, we tend to under explain the role that issues play in structuring the Court's agenda. This micro-level emphasis implies that the Court's attention to issues arising across sets of cases is merely the incidental result of the merits of individual cases. For example, case-centered theories of certiorari would suggest that the Supreme Court gradually agreeing to hear fewer cases related to criminal procedure and more cases related to economic issues over a period of several years is most likely to occur as a result of changes in the relative "attractiveness" of individual cases in those separate issue domains. This account stands in stark contrast to theories of issue attention in the elected branches of American national government, in which issue attention is generally understood to be a dynamic, macro-political process motivated by changes in the political environment and the ideological inclinations of office holders (Baumgartner and Jones, 1993).

At its core, this dissertation is about the puzzle of how the dynamics of agenda-setting play out in the United States Supreme Court, an institution that is unique in its ability to choose between issues to place on its agenda, but not create issues to place on its agenda and why an unelected branch of government is attentive to the preferences of the public and other political actors. Here, I present a theory of macro-political issue attention on the Supreme Court which brings together literature on internal and external constraints on judicial decision-making, as well as acknowledging the influence of the pool of appeals litigants bring before the Court in ways that reinforce the justices' changing orientation toward issues. From this theory, I generate predictions regarding the effect of partisan issue ownership on the Court, the importance of public attentiveness to issues as it influences case selection, and how changes in the broader political, environmental and social landscape drive variation in issue attention within the judiciary. By bringing together insights on institutional agenda-setting and judicial behavior, we can develop a better understanding of the role the Supreme Court plays in the policy process.

1.1 Existing Work on Certiorari and Agenda Setting on the U.S. Supreme Court

1.1.1 A Brief Overview of the Certiorari Process

Among the most important decisions that the Court makes in any case is whether to take it in the first place. The decision of whether or not to grant certiorari is an important early step in the decision-making process that has been focused on by most scholars of the Court: the decision on the merits. At the certiorari stage, the justices themselves are choosing which cases to hear. The justices have no obligation to disclose why they selected one case over another, nor indicate how their future vote on the merits. That the justices themselves have the ability to choose which cases they do and do not hear has not been lost on either members of the Court nor on scholars of law and courts. Justice Brennan referred to their ability to set the agenda as “second to none in importance,” and Justice Marshall stated that the power to not decide a case is “among the most important things done by the Supreme Court” (Brennan, 1972; Marshall and Tushnet, 2001).

For more than a century, the Supreme Court’s docket was largely mandatory. In 1925, however, Chief Justice Taft and the other justices were successful in convincing Congress to pass the Judges’ Bill, which gave the Court a freer hand with which cases it took. While the bill did not eliminate the Court’s mandatory jurisdiction entirely, Congress continued to whittle away at the remaining parts of it until the late 1980s, with the passage of the Case Selections Act, the Court received almost complete discretion of the cases selected for review. This discretion operates through a writ of certiorari. The Court receives between 6,000-8,000 petitions for the writ every year. From these, the Court will grant certiorari only about 1 percent of the time. Indeed, despite other justices speaking to the importance of discretionary jurisdiction, Justice Scalia once noted that “I don’t worry about cert grants. We get thousands of cases every year. If we miss a case today, we’ll see it again tomorrow” (Sotomayor and Greenhouse, 2014, p.383).

Granting the writ is a matter of utter discretion. The justices rarely provide reasons for their votes, and there is no clear formula for what makes a case certworthy. The guidelines or considerations for granting certiorari appear in Rule 10 of the Supreme Court’s Rules. The Court professes

an interest in resolving circuit splits, clarifying federal law, rebuking lower courts that misstate precedent and deciding important questions. These guidelines, such that they are, provide little useful guidance in practice.

The formal certiorari process begins when a party to a case files a petition. Given the number of petitions, the Court streamlines consideration of the petitions through the “cert pool.” Not all justices participate in the cert pool.¹ For those that participate, they assign their clerks to contribute memos to the pool. The process proceeds as follows. When a petition arrives, the Clerk of the Court assigns the memo to one of the clerks. That clerk reviews the case file and writes a memo to be circulated to all participating justices. The memo describes the facts of the case, the arguments of the parties, the legal issues in question, and makes a recommendation as to whether or not the petition should be granted. The memos are often the only information the justices have about the petitions, as even the most certworthy petitions get minimal review at the preliminary stage.

Once the justices receive the memo, they create the “Discuss List.” The Chief Justice initiates the creation of the list by circulating a preliminary list of cases to discuss at the weekly conference. Any justice may add a case to the list on his or her own initiative by sending a request to the Chief. The list circulates throughout the week with cases being added or removed, and once finalized, all cases not on the list have the petitions summarily denied. Interestingly, the Court maintains a strong norm to not discuss petitions prior to conference. Those discussions at conference, though, are quite limited.² After the discussions on each petition on the list, the justices vote whether to grant or deny the petition.

A justice may vote to deny the petition, grant the petition, or Join-3. This last option amounts to a “timid grant” (Perry, 1991). It has utility because the Court follows a minority voting rule at the agenda-setting stage. The Rule of Four, which was a by-product of the Judges’ Bill of 1925, requires that it only takes four justices to support a petition for it to be granted. The Join-3 option

¹Justice Stevens never participated in the cert pool. Justice Alito participated for the first few years he was on the Court, but has since withdrawn from participation. And Justice Gorsuch elected to not join the cert pool upon his confirmation in 2017.

²McElwain (1949) estimated that the Court spent less than 3.5 minutes discussing the petitions in the late 1940s. It is likely that number has shrunk in the intervening years due to the advent of the cert pool and the increase in petitions.

simply says that a justice is willing to be the fourth vote. In other words, it counts as a grant if three other justices vote to grant the petition, but it would count as a denial if two or fewer justices vote to grant. If the Court grants the petition, the Court will take the case and subsequently decide it on the merits under majority rule. At the end of each week, a list is published with the petitions granted and the petitions denied. The votes of the justices are not public, so it is difficult to determine which justices supported or opposed the petition. In some rare circumstances, a justice will publish a dissent from a denial of certiorari in order to invite continuation of the conversation and litigation surrounding the issue of the denied petition. Justice Sotomayor, who has published more than one dissent from a denial of certiorari admits that there is institutional pressure to not issue those statements, but sometimes she feels personally compelled to open the door regarding a petition on the same issue at a later time (Sotomayor and Greenhouse, 2014, p.376).

1.1.2 Case Supply to the Supreme Court

“Judicial policy making is like piecing together a jigsaw puzzle. Litigants who are paying attention to the Court’s signals know which pieces are missing and which pieces should come next. The more active they are in bringing the missing pieces to bear, the more likely the Court is to fill in the puzzle. The fuller the puzzle, the more say the Court has over a wider variety of legal and political outcomes” (Baird, 2007, p.3). In other words, a full understanding of agenda setting requires understanding not only what happens to a case once it reaches the Supreme Court, but how it arrives there in the first place.

First, consider the decision to appeal. The literature on litigant decision making assumes that the litigant is a rational actor (see Landes, 1971). Litigants are likely to engaged in rational behavior when deciding to appeal an unfavorable court of appeals decision when a dissent is published at the lower court level that casts doubt on the appellate court’s decision, especially in search and seizure cases (Songer, Cameron and Segal, 1995). Additionally, a litigant is likely to appeal when the perceived ideological distance between the lower court and the Supreme Court increases (Mak, Sidman, and Sommer, 2013). The litigant as a rational actor in deciding to appeal has also been extended to include familiarity with Court itself. The more experience and familiarity a litigant has

with the Court, the more information they possess to make a sophisticated or strategic decision, and this ability leads to higher grant rates by the Court, especially if the level of inequality between the petitioner and respondent is great (i.e., the petitioner is the federal government and the respondent is a poor individual) (Black and Boyd, 2012).

Another way that cases reach the Supreme Court is through the justices of the Court taking an active role in soliciting cases. While the traditional view is that the Supreme Court is a passive actor and must wait for a case to petition for certiorari before it can rule on a particular legal issue, some research does push back against this conventional account (Baird, 2007; Rice, 2014). For example, Baird (2004, 2007) examines how Court activity in an issue area during one term influences the flow of cases seeking its attention in later terms. Her results suggest that when the Court issues a salient decision in an issue area, there is a significant increase in cases involving related issue areas at the Supreme Court four to five years later, with this time lag being driven by the time it takes most cases to work their way up to the Supreme Court. Rice (2014) provides additional support for Baird's theory and finds that salient Supreme Court rulings in a specific issue area led to fewer cases being heard and decided on that issue in the lower courts in the years immediately following the salient decision. However, three-to-five years later, interest group activity and the number of published district court opinions increases; highlighting Baird's (2004, 2007) initial findings for the time lag between salient decisions and a spike in the number of related cases. In other words, once the message is received, it takes some time for an issue to bring about a case before it can enter the federal court system.

Regardless of whether the Court signals for the type of cases they wish to hear, their agenda relies primarily on the litigants' decision to appeal, as well as their past agenda decisions. Beyond being rational, existing work illustrates that the justices are influenced by external forces, namely the judicial and political environment in which they may make the decision of whether or not to grant a petition for certiorari. One component of the political and judicial environment is the feedback cycle between the Supreme Court and lower courts (Hurwitz, 2006). Or, the Supreme Court's previous rulings influence whether litigants appeal their case to the circuit courts, which ultimately

impacts what is available to appeal to the Supreme Court. However, most of the literature on aggregate explanations of the agenda are motivated by micro-level considerations.

1.2 Theoretical and Empirical Limitations and Unsolved Puzzles

Scholars of judicial politics agree that Supreme Court agenda setting cannot be characterized by one decision to grant or deny review. Instead it is a process, with multiple stages of influence and decisions to be made by the justices. And while substantial work has uncovered the micro-level processes that bring individual cases before the Court, scholarship on case selection is still a burgeoning field. The main reason for this is the availability of data. The agenda-setting process begins with a petition for review and ends with the Court's decision to grant or deny, but this course is a long one with many steps. Much of this work occurs in private, with only the final outcome (i.e., grant or deny) being reported. It is rare that the public is alerted to how justices cast their agenda votes. The most common way this happens is when a justice decides to author a dissent from the denial of certiorari, which has become a growing trend over the last decade (Feldman, 2016). However, of the thousands of cases that were both granted and denied review between the 2010 and 2015 terms, this only occurred 43 times, leaving the public largely in the dark as to what transpires at the agenda stage. Thus, this pivotal process is difficult to dissect (Feldman, 2016).

Because of the secrecy of this process, the single biggest barrier to studying agenda setting is data availability. Initially, most research on agenda setting was solely based on the final case-level outcome: whether the Court granted or denied review. In terms of explaining that decision, researchers were limited to case characteristics that could be easily gleaned from the agenda-setting briefs in case. For example, the earliest scholarship on the Court's agenda focused on the federal government as a petitioning party, dissents published by the lower court, and cases involving civil liberties (Tanenhaus, et al., 1963). Also, because information was not released on who specifically had voted to grant (or deny) review (Songer, 1979), all of this research was conducted at the aggregate Court level. Research on individual justice behavior was not possible.

However, research on agenda-setting has been transformed due in large part to information accessibility. Instead of relying on publicly available data from recent terms, researchers have looked

to archival data to understand what happens between the submission of the certiorari petition and a case receiving a grant and being placed on the calendar for oral argument. Maltzman, Spriggs and Wahlbeck were among the first to leverage this archival data to explore issues of collegial bargaining (Maltzman, Spriggs and Wahlbeck, 1999, 2004), and opinion assignments (Maltzman, Spriggs and Wahlbeck 1996, 2004).

Thirty eight former justices have archived their personal papers at the Library of Congress, and the organization and completion of those archived papers varies from justice to justice. Justice Harry A. Blackmun chronicled the near entirety of his career, including his time on the Supreme Court from 1970 to 1993. Five years after Justice Blackmun's death, his papers were made available to researchers at the Library of Congress. His collection of personal papers spans more than 1,500 boxes that hold important agenda-stage documents like preliminary pool memoranda, discuss lists, and Blackmun's certiorari vote record. Epstein, Segal and Spaeth (2007) created a digital archive of Justice Blackmun's case selection materials, which maintains a digital record from 1986 to 1993. These data have been used in numerous articles since 2007 to examine a variety of aspects related to agenda-setting such as the connection between certiorari votes and votes on the merits (Black and Owens, 2009) and the effect of the separation of powers on case selection (Owens, 2010).

While the Blackmun Archive has been an invaluable resource for understanding what happens during the case selection process, it only provides a very small window into agenda-setting on the Supreme Court. Further, research which has leveraged the Blackmun Archive has focused on a dyadic decision to grant or deny one petition for certiorari, as do most studies of certiorari. The short time frame covered by the Archive, together with the focus on dyadic decisions and micro-level considerations has limited the agenda-setting literature to answer particular types of questions under-estimates the interdependence of cert petitions and the dynamics of agenda-setting.

Recent research has sought to advance the agenda-setting literature by developing a dynamic theory of dispute resolution to account for the interdependence of cert petitions and the dynamic process of doctrinal development (Beim, Clark and Patty, 2017). Here, the authors argue that there

is a “companion interpretation of how ready a case is to be resolved that turns on downstream consequences of resolving an issue” (Beim, Clark and Patty, 2017, p.203). In other words, a case is characterized in part by its progeny, or the subsequent questions or disputes that the justices expect to be raised by its resolution. Under this view of dynamic dispute resolution, when the Supreme Court chooses which cases to decide in a given year, that set of cases may be evaluated collectively, so the Court may take a broad perspective when choosing that set of cases. This is undoubtedly an important step forward in understanding the process of case selection, but this decision-theoretic model has yet to be empirically tested with cert-level data.

The dynamics of agenda-setting have not been ignored by the literature, per say. However, evaluations of dynamic issue attention have often been restricted to a single issue area. Flemming, Bohte and Wood (1997) provided the first effort at modeling the Supreme Court’s impact on systemic attention to policy domains in which the Court is especially active. To determine whether the Supreme Court influences the national agenda over time, they examine clearly defined, active issue areas for which reliable and appropriate time series data were available, choosing to focus on issues within the civil rights and liberties policy domain: school desegregation, church–state relations centering primarily on establishment questions, and freedom of speech and obscenity matters. They find that from 1947 to 1992, four decisions prompted the media to increase its coverage of the issues and sustain a heightened level of attention, suggesting that some decisions concern such controversial issues that the Supreme Court exerts top-down influence over issue attention across political institutions and with the public. Additionally, Flemming, Bohte and Wood (1999) provide useful insights to the impact of agenda-setting in a system of separated powers. Here, they find that American political institutions are engaged in systematic reciprocal agenda-setting in which the respective concerns of Congress and the Supreme Court drive one another through time, and those horizontal interactions structure top-down agenda-setting from institutions to the people. While this analysis does include more issue areas than just civil rights, the analyses are limited to one issue area at a time. In other words, despite the important contribution these studies make to agenda setting dynamics, there is no consideration of the system as whole, in which issue attention to one

area necessarily means that attention to other areas is limited.

This dissertation, then, offers an original perspective on issue attention and agenda dynamics, grounded in previous literature, to articulate a dynamic theory of issue attention. First, this dissertation seeks to determine whether issue attention in individual issue areas is the result of macro-political considerations, or if the existing literature on the micro-political foundations of case selection do explain Supreme Court agenda-setting. Next, this dissertation introduces a new methodological approach to modeling system dynamics to test the theory that issues, not cases, explain the dynamics in judicial issue attention. These theoretical goals are outlined more fully in the next section.

1.3 Theoretical Goals of the Dissertation

My theoretical argument starts from the familiar premise that justices pursue their policy goals within the bounds of certain internal and external constraints (Epstein and Knight, 1998; Hammond, Bonneau and Sheehan, 2005; Murphy, 1964). At the agenda-setting stage, this means that justices look forward to the likely merits disposition when deciding whether to grant a case. However, the ideological preferences of a justice's colleagues and the pressures put on the Court by public opinion are not the only potential constraint that may affect the ideological direction of the decision on the merits; the justices must consider the public's perceptions of the saliency of an issue area.

Here, I argue for a macro-political theory of issue attention by the U.S. Supreme Court. Although its justices are not merely "politicians in robes," there is substantial evidence that important aspects of the justices' decisions on the merits of cases are motivated by their ideological attachments (Black and Owens, 2009; Epstein, et al. 2007; Segal and Spaeth, 2002). These ordinary political motives likely influence Supreme Court justices to become more or less likely to hear cases from various issue areas as the composition of the Court changes and as the state of political and economic environment around the Court evolves. Contextual changes in the nation's political and economic life also likely influence the pool of appeals litigants bring before the Court in ways that reinforce the justices' changing orientation toward issues.

The adoption of a macro-political approach to agenda setting to account for variation in issue attention on the Court over time lends itself well to an economic or interest-group theory of government, as articulated by Palmer (1982). Here, legislatures, executives, and courts are perceived as producers and sellers of governmental protection. In particular, the Supreme Court operates as a “producer” of government protection by producing changes in the law. These changes, which either solidify or alter the status quo, are achieved by accepting and rejecting selected decisions of the lower courts. Further, this assumes that all the Court’s actions will affect the law to some degree. Discretionary jurisdiction is an essential feature to this framework because that discretion allows the Court to decide how and when changes in the law will be produced based on the cases the Court chooses to review.

Broadly, this perspective supports three predictions about the dynamics of issue attention on the Supreme Court. First, the Supreme Court’s issue attention should shift toward policy domains over which Republicans exert greater issue ownership as the membership of the Court becomes more conservative, and, conversely, the Court should pay greater attention to policy domains over which Democrats have stronger issue ownership as the Court becomes more liberal. Second, the Court’s issue attention should follow public perceptions of problems in the political, economic, or social environment, leading the Court to take more cases in issue areas where the American people identify important public problems. Finally, the Court’s issue agenda should respond to changes in the political, economic and social environment that produce changes in the volume of litigation activity in particular policy domains, influencing the composition of the set of cases from which the Court constructs its docket and, therefore, its issue agenda. The diagram below visually depicts the competing influences on judicial issue attention.

Additionally, this dissertation takes an important step forward in explaining the dynamics of issue attention by theorizing about agenda-setting as a series of trade-off relationship, or how the Court allocates their resources among the various issue areas and policy domains. Further, this dissertation seeks to differentiate the influences of party and ideology on issue attention. Most studies of judicial behavior focus on ideology and its influence on decision-making. However, party and

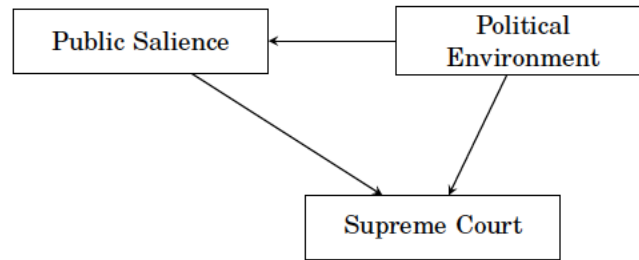


Figure 1.1: The External Influences on Supreme Court Issue Attention

ideologym while related, are seperable concepts. By leveraging existing literature on issue ownership, which relies more on partisanship than ideology, this dissertation attempts to tease out the differences between partisanship and ideology as they relate to decision-making behavior and variation in issue attention on the Supreme Court over time. In addition to considering Supreme Court agenda-setting as trade-offs between issue area, this dissertation argues that the composition of the Court (both in terms of ideological preferences—liberal or conservative—and partisan attachments) may affect the priortization of different issue areas over time in terms of doctrinal development. government as whole pays attention to the issues it does.

1.4 Outline

The rest of the dissertation procees as follows. Section 2 elaborates and clarifies the macro-political theory of issue attention broadly alluded to here. It then develops these general expectations as predictions about the Supreme Court’s attention to issues related to the economy. Section 3 builds upon the analysis in the preceeding section by further explaining how the interaction of public issue attention and institutional issue attention generates a macro-political theory of agenda-setting. It tests the expectations as predictions about the Supreme Court’s attention to issues related to criminal procedure, issues that are less dependent on actors outside of the judicial hierarcy for implementation and enforcement. Section 4 brings together a theoretical framework that focuses on the influence of macro-level considerations on certiorari with a methodological emphasis on

explaining dynamic agenda-setting. This section examines the trade-off relationships that shape the Supreme Court's agenda over time, and tests the theoretical prediction that the composition of the agenda reflects the relative importance of the Court's partisan priorities. Section 5 concludes.

2. SELECTING ON THE ECONOMY? ECONOMIC PERFORMANCE AND ISSUE ATTENTION ON THE U.S. SUPREME COURT

2.1 Introduction

Defining issue agendas is critical part of any political process (Bachrach and Baratz, 1962; Baumgartner and Jones, 1993; March and Olsen, 1976; and Schattschneider, 1960). . Participants in political processes must actively choose the policy spaces they will consider as a first step toward the possibility of subsequently making policy changes. Placing a policy space on a group or institution's agenda is a necessary but insufficient condition for policy change in that space. Likewise, failing to place a policy space on the issue agenda ensures that existing policies in that area will continue to prevail. The dynamics of issue selection and attention are, therefore, essential processes in virtually every political institution and important objects for students of institutional politics.

Issue attention by Supreme Court of the United States is structured by two related, strategic processes. First, litigants decide whether to appeal unfavorable decisions by lower courts, often U.S. Courts of Appeals or state courts of last resort, to the Supreme Court. Second, since 1925, with few exceptions, the Supreme Court decides which appeals to hear by selectively granting writs of certiorari. The Court, therefore, builds its issue agenda from a pool of potential cases shaped by the prior decisions of litigants.

There is an extensive literature in political science and related fields on the features of individual cases that make the Supreme Court's justice more or less likely to choose particular cases to decide from the pool of petitions for certiorari (e.g., Perry, 1992, Black and Owens, 2009a; and Ulmer 1984). Among these, cases representing conflicts in legal rules adopted by different U.S. Courts of Appeals (circuit splits), involving the participation of high profile litigants and *amicus curiae* (non-litigant parties who file briefs in support of or opposition to the Court hearing a case), or drawing support of the solicitor general (the United States government's formal legal counsel at

the Supreme Court bar) are especially likely to be chosen. (Beim and Rader, 2018; Caldeira and Wright, 1988; McGuire and Caldeira, 1993; Owens, 2010). Although the chances of any particular case will be selected by the justices is quite low, scholars can identify the cases with the highest propensity to be selected.

This case-centric, micro-political view of Supreme Court case selection implies that the Court's attention to issues arising across sets of cases is merely the incidental result of the merits of individual cases. For example, case-centered theories of certiorari would suggest that the Supreme Court gradually agreeing to hear fewer cases related to criminal procedure and more cases related to economic issues over a period of several years is most likely to occur as a result of changes in the relative "attractiveness" of individual cases in those separate issue domains. This account stands in stark contrast to theories of issue attention in the elected branches of American national government, in which issue attention is generally understood to be a dynamic, macro-political process motivated by changes in the political environment and the ideological inclinations of office holders (Baumgartner and Jones, 1993).

Here, I argue for a macro-political theory of issue attention by the U.S. Supreme Court. Although its justices are not merely "politicians in robes," there is substantial evidence that important aspects of the justices' decisions on the merits of cases are motivated by their ideological attachments (e.g., Black and Owens, 2009a, Epstein et al., 2007; and Segal and Spaeth, 2002). . These ordinary political motives likely influence Supreme Court justices to become more or less likely to hear cases from various issue areas as the composition of the Court changes and as the state of political and economic environment around the Court evolves. Contextual changes in the nation's political and economic life also likely influence the pool of appeals litigants bring before the Court in ways that reinforce the justices' changing orientation toward issues.

Broadly, this perspective supports three predictions about the dynamics of issue attention on the Supreme Court. First, the Supreme Court's issue attention should shift toward policy domains over which Republicans exert greater issue ownership as the membership of the Court becomes more conservative, and, conversely, the Court should pay greater attention to policy domains over

which Democrats have stronger issue ownership as the Court becomes more liberal. Second, the Court's issue attention should follow public perceptions of problems in the political or economic environment, leading the Court to take more cases in issue areas where the American people identify important public problems. Finally, the Court's issue agenda should respond to changes in the political and economic environment that produce changes in the volume of litigation activity in particular policy domains, influencing the composition of the set of cases from which the Court constructs its docket and, therefore, its issue agenda.

I develop these general expectations as predictions about the Supreme Court's attention to issues related to the economy. First, I expect that attention to the economy will be positively related to greater conservatism among the justices. Second, my theory predicts that more widespread perceptions of the economy as an important problem will also increase the Court's attention to the economy. Finally, I argue that the Court's attention to economic issues should be related to changes in the actual economic performance, although the direction of the effect is not clear *ex ante*. On the one hand, a growing economy may generate a larger volume of litigation and appeals to the Supreme Court as an increasing number of and array of business ventures expand and interact with one another and the law in new ways. Alternatively, a shrinking economy may generate additional litigation and appeals to the Supreme Court as economic actors turn to courts to preserve economic benefits that are threatened by lower growth.

I evaluate these expectations by examining the Supreme Court's attention to economic issues from 1952 to 2015. I estimate a statistical model of the number of Supreme Court cases related to the economy or labor unions according to the Supreme Court Database in each term as a function of the expressed ideology of the Court's justices, Americans' perceptions of the economy as the "most important problem" facing the country, and actual rate of growth in the U.S. economy. The data provide significant support for my theoretical expectations. As expected, the Supreme Court's attention to economic issues is positively related to greater ideological conservatism among the justices and also to the proportion of Americans who regard the economy as the nation's most important problem. The data also show a significant association between economic growth and

judicial attention to the economy. All else equal, stronger economic growth predicts more attention to the economy by the Supreme Court.

These results indicate that issue attention by the U.S. Supreme Court is not merely the result of the incidental aggregation of the policy domains in which individual cases are situated. The Court's attention to economic issues is systematically associated with macro-political dynamics in the ideological orientations of the Court's members and the state of the national economy. This mirrors patterns of aggregate issue attention in the elected branches of national government and highlight a political economy of judicial issue attention. These results also provide a more complete picture of the relationship between the U.S. Supreme Court and the broader dynamics of the American political system. They are likewise further evidence of ordinary political motives at play along with legal factors in the behavior of Supreme Court justices.

2.2 Agenda-Setting and Issue Dynamics on the Supreme Court

The traditional view in the literature on agenda setting and the Supreme Court has been that while justices may be strategic in later stages of the process, the Court is generally focused on the law when deciding which cases to hear. Decades of scholarship on the determinants of the Court's agenda have suggested that justices pay attention almost exclusively to institutional and legal case factors when voting on certiorari, or the micro-level processes which bring cases before the Court. Under this approach, the emphasis is on individual cases and fluctuation in justices' votes on the merits, where strategy plays out on a case-by-case basis. In other words, the micro-level approach considers that each case has a latent degree of certworthiness that becomes evident to the justices through a variety of different factors. The most prominent examination of the certiorari process in general remains (Perry, 1991) , which leverages numerous interviews with justices and their law clerks to provide an in-depth, qualitative look at this rather secretive process. Other scholars have adopted a more quantitative approach, and focused on more narrow questions pertaining to specific aspects of the certiorari process over time.

In an attempt to explain how case-specific factors influence the decision to grant certiorari, scholars have examined the role of jurisprudence in accepting cases for review (e.g., Black and

Owens, 2009a; Caldeira and Wright, 1988; and McGuire and Caldeira, 1993). Additionally, Beim and Rader (2018); Epstein, Martin and Segal (2012); Perry (1991); and Ulmer (1978) all find that the Court is more likely to take a case when there is a disagreement between lower courts, or when lower courts deviate from clear Supreme Court precedent. Additionally, scholars have considered whether certiorari votes are affected by the anticipated vote on the merits in determining whether or not to grant review to a petition (Benesh, Brenner and Spaeth, 2002; Boucher and Segal, 1995; Caldeira, Wright and Zorn, 1999; and Palmer, 1982). Similarly, Palmer(1990) demonstrates that the justices are more likely to grant petitions in cases where they will vote to reverse the lower court. However, other scholars have demonstrated that the Court is more likely to grant certiorari in attempts to induce compliance within the judicial hierarchy (Boucher and Segal, 1995; Caldeira and Wright, 1988; Caldeira, Wright and Zorn 1999; and Cameron, Segal and Songer, 2000) . Other scholars have examined certiorari from a separation of powers framework, and looked at the extent to which Congress attempts to influence the Court's decision to grant certiorari (Harvey and Friedman, 2009; and Owens, 2010) . The involvement of the Solicitor General and interest groups (Caldeira and Wright, 1988; Caldeira, Wright and Zorn, 1999) , signals from lower courts such as dissents on the panel, the use of lower court judicial review, or en banc review (Black and Owens, 2009a; Owens, 2010) provide additional influences on the Court's decision to grant a case. These studies have allowed for a more comprehensive examination of which cases are selected for review. Indeed, the influence of these variables has been validated over so many different studies that the case-level determinants of a grant of certiorari are arguably the best understood part of the Court's decision-making process.

The strategic model of decision-making is built around the premise that justices pursue their policy goals within the internal constraints of their colleagues' preferences and external constraints of other political actors. However, at the agenda setting stage, there is still limited evidence that justices consider either type of constraint when casting agenda-setting votes.

In terms of internal constraints, formalized strategic accounts of a justice's vote to grant certiorari suggest that she look forward to her ideological preferences on the merits and strategically

grant cases when she is closer to the projected merits outcome (usually measured as some variant of the median justice) and strategically deny cases when she prefers the status quo (or the decision of the lower court) (Hammond, Bonneau and Sheehan, 2005). Anecdotal evidence (Perry, 1991) and quantitative scholarship (Benesh, Brenner and Spaeth, 2002) suggest that there are limits to this intuition, pertaining to the question presented in the case. Additionally, Epstein, Martin, and Segal (2012) argue that if justices are free to pursue policy goals, it is only in cases where the “certworthiness” of a case is borderline. Black and Owens (2009a) demonstrate that while justices are forward-looking at the certiorari stage, their ideological preferences are overridden when legal or institutional factors strongly counsel a grant. In other words, internal constraints only matter when legal signals are weak.

That justices respond to external constraints at the agenda-setting stage receives even less support in the literature. Epstein, Segal and Victor (2002) find limited support for a relationship between the long-term dynamics of the Court’s agenda and congressional preferences; the Court grants fewer statutory cases when it is more out of step with Congress. The authors do note that their results are limited to explaining broad aggregate trends in the data, which might miss the nuances of the micro-level approach to certiorari, but better help to explain variations in issue attention over time. Adding to the understanding of the relationship between the Court and Congress, Owens (2010) examined all existing spatial models positing a separation of powers constraint on the Court’s agenda. He finds no evidence that justices respond to the preferences of Congress when deciding what to decide.

Additionally, the evidence of a separation of powers effect at the merits stage is also mixed. Sala and Spriggs (2004); Segal (1997); and Spriggs and Hansford (2001) all suggest that justices merely vote their sincere preferences at the merits stage, and, occasionally, those preferences align with the will of the elected branches. Thus, any apparent relationship between the two is congruence rather than constraint. Scholars who do find that there is a separation of powers effect at the merits stage suggest that the effect is mediated through some other source. For example, Clark (2009) find the Court is less likely to invalidate a piece of federal legislation when there is

a higher rate of bills introduced in Congress to curb the Court's power. Clark argues that rather than responding directly to the threat of Court curbing, justices take increased negative attention by members of Congress as a signal that it is out of step with the American people, endangering their institutional legitimacy.

While there is mixed evidence concerning internal or external institutional constraints on Supreme Court agenda-setting, there is a stronger demonstrated effect of public opinion as a constraint. McGuire and Stimson (2004) suggest the justices are influenced by the same shifts in macro public opinion over time, while others suggest that justices are directly constrained by public opinion in terms of support for the institution (Casillas, Enns and Wohlfarth, 2011; and Giles, Blackstone and Vining, 2008) or fear of nonimplementation of their decisions (Hall, 2014). While this scholarship has helped tease out which external constraints have a larger effect on the Court, they still focus on the micro-level processes of agenda setting, and make the assumption that there is no meaningful variation in American public opinion, or judicial attention, between issue area. However, recent work (Coggins et. al, ND; and Rice, 2014) finds that there *is* meaningful variation in attention to issues. Additionally, Bryan (2014) demonstrates that justices are highly responsive to issue salience when deciding which cases to grant certiorari. Specifically, she finds that cases dealing with issues that few, if any, Americans would consider the most important issue facing the United States have an approximately 0.14 probability of receiving a grant vote from a justice. As salience increases, and a greater proportion of Americans report they are deeply concerned by the issue, the probability of a vote to grant increases more than three-fold. These results suggest that Justice Brandeis' perception of important issues is correct: "it is usually more important that the rule of law be settled, than that it be settled right" (dissenting opinion, *DiSanto v. Pennsylvania*(1927)). Bryan's (2014) contribution to the literature on public opinion and the Supreme Court suggests that not only does issue salience matter, but that the issues themselves might provide a better understanding on explaining variation in agenda composition over time.

That there is a strong demonstrated effect of public opinion as a constraint on the Court at the merits stage has important implications for the justices' considerations of the constraint of public

opinion at the agenda setting stage. Additionally, that there is meaningful issue variation in terms of public attention to issues and the Court's response to different levels of salience across issues suggests the importance of taking a more macro-level approach to agenda setting by focusing on the issues themselves, rather than the individual cases before the Court. Next, I consider the relationship between the public's attention to and perceptions about the state of the national economy, and the economic cases on the Court's agenda. If the justices are attentive to which issues the public considers to be important and choose to enter into the policy debate concerning those important issues, the justices need to take cases that allow them to pass judgment on the economy.

2.3 The Political Economy of Judging

The connection between economics and politics has long been acknowledged by scholars, particularly in regards to how voters use their perception of the state of the economy to evaluate the policymaking competence of elected officials. The strongest link between economic evaluations and politics has emerged in understanding and evaluating the ways in which voters reward or punish the president (e.g., Alvarez and Nagler, 1995, 1998; Clarke et al., 2005; Conover, 1985; and Conover, Feldman and Knight, 1986, 1987), this connection has emerged in congressional elections (see, Lewis-Beck and Rice, 1992; Owens and Olson, 1980). Despite the well-documented accounts of the effect of macroeconomic conditions and voters' perceptions of those conditions on different branches of the federal government, little attention has been paid to the third branch, the United States Supreme Court. Perhaps scholars have not anticipated observing any effects of the macroeconomy on the unelected branch of the federal government, as the justices have "no authority whatsoever to adopt fiscal or monetary policy intended to relieve the economic pressures facing the nation" (Brennan, Epstein and Staudt, 2009b, p.1505). However, while the justices might not be able to directly adopt or implement economic policy designed to bolster the national economy, they are not isolated from the effects of the macroeconomy either. In particular, the Court routinely hears and decides cases and controversies that implicate the national economy, which provide a way in which the Court can play a role in the recovery or maintenance of the national economy.

Brennan, Epstein and Staudt (2009a) argue that “rational Justices will look to the economy as a signal of policymaking competence in the elected branches of government *and* will use their decisionmaking power to support (or impede)” legislative or executive policies (p. 1203, emphasis in original). If the justices truly believe that they have a role in shaping economic prosperity, then

judicial refusal to implement perceived policy failures could work to limit possible damage to the economy, thereby advancing the interests of the Justices. Similarly, in times of crisis, we simply argue that the Court’s progovernment bias will assist Congress and the president in the recovery effort, again, promoting the Justices’ interests in economic growth and stability.¹

This seems to suggest that Supreme Court justices deliberately vote to punish, reward, or assist the government depending on the state of the economy. And Brennan, Epstein and Staudt conclude not that judicial decisions simply correlate with economy trends, but that a causal link exists between the economy and the decisions of the Court because the justices purposely decide cases to shape the economy, albeit at the margins. In other words, the state of the economy matters both for how the justices will decide a case in the economic issue area, but which cases the justices are likely to accept for review. However, the decision to grant review to certain types of cases is not included in either of Brennan, Epstein and Staudt’s empirical examinations of the connection between the state of the economy and judicial decision making, which is something this article hopes to more clearly address.

Further, as Brennan, Epstein and Staudt (2009b) note, a significant portion of the Court’s docket is comprised of legal disputes that are both directly and indirectly associated with the financial well-being of the federal government, business entities, and private individuals. Specifically, from 1952 through 2015, approximately twenty five percent of the cases before the Court involved some economic issue.² Further, “litigants are not shy about bringing the state of the economy to the Court’s attention: their briefs are replete with references to macroeconomic issues such as

¹Brennan, Epstein and Staudt (2009a, p.1023).

²Using the coding from the Spaeth et al. (2017) database, “economic issue” is defined as any case concerning Unions, Economic Activity, or Federal Taxation (issue codes 7,8, and 12 respectively).

“economic crisis,” “banking crisis,” “housing crisis,” “high inflation,” “serious unemployment,” and so forth. The parties consistently refer to these issues and to national economic factors in presenting their legal arguments in hopes of convincing the Justices that they are well-positioned to ease existing economic problems—and should use their power for this purpose” (Brennan, Epstein and Staudt, 2009b, p.1506).

Whether or not the Court pays heed to these references made by litigants and responds to them is a question that has largely gone unanswered. Brennan, Epstein and Staudt (2009b) determined that the Court acts in much the same way as the voter in that the justices use their decision making power to punish elected federal officials in recessionary periods and reward them in times of prosperity. In particular, when the macroeconomic indicators are performing well (periods of low inflation, low unemployment and high productivity), then the Court is more likely to decide cases in favor of the federal government and help facilitate the economic policies that are currently being pursued and implemented. Conversely, during periods of high inflation, high unemployment and low productivity, the Court is more likely to frustrate the current economic policies in hopes of promoting economic recovery. In this sense, the macroeconomy serves as a signal for the justices in a similar way in which voters take cues from their perceptions of the state of the economy to reward or punish elected officials, and indicates that the justices are not as isolated from the public or from both political and economic reality.

That there is a strong demonstrated effect of public perceptions about the state of the economy on interactions between voters and elected politicians establishes the connection between the economy and politics. Because the Supreme Court is affected by public opinion, and the Court hears cases regarding the national economy, examining the effect of changes in economic conditions and public perceptions of those changes provides an opportunity to understand why attention to economic cases by the Court ebbs and flows over time. I turn now to exploring the implication of variation in issue attention and developing a series of expectations concerning when and how justices should respond to variations in public preferences about the state of the economy when choosing which cases to hear.

2.4 A Theory of Issue Attention, Economic Conditions, and Judicial Decision-Making

My theoretical argument starts from the familiar premise that justices pursue their policy goals within the bounds of certain internal and external constraints (Epstein and Knight, 1998; Hammond, Bonneau and Sheehan, 2005; Murphy, 1964). At the agenda-setting stage, this means that justices look forward to the likely merits disposition when deciding whether to grant a case. However, as I outline above, the ideological preferences of a justice's colleagues and the pressures put on the Court by public opinion are not the only potential constraint that may affect the ideological direction of the decision on the merits; the justices must consider the public's perceptions of the saliency of an issue area.

Adopting a macro-level approach to agenda setting to account for variation in issue attention on the Court over time lends itself well to an economic or interest-group theory of government, as articulated by Palmer (1982). Here, legislatures, executives, and courts are perceived as producers and sellers of governmental protection. In particular, the Supreme Court operates as a "producer" of government protection by producing changes in the law. These changes, which either solidify or alter the status quo, are achieved by accepting and rejecting selected decisions of the lower courts. Further, this assumes that all the Court's actions will affect the law to some degree. Discretionary jurisdiction is an essential feature to this framework because that discretion allows the Court to decide how and when changes in the law will be produced based on the cases the Court chooses to review. In line with the extensive literature on the importance of discretionary jurisdiction for understanding agenda setting on the Supreme Court, it is possible that the macro-level approach of focusing on issue areas rather than on individual cases is just noise. Or, that in setting their agenda, the Court is focusing on the cert-worthiness of each individual case

Along with discretion, issue fluidity (McGuire and Palmer (1995,1996) allows for a better understanding of the connection between partisan issue ownership and Supreme Court decision-making. Issue fluidity speaks to the ability of judges to transform the issues in the cases they decide because of the malleability inherent in questions of law. The questions resolved at trial level are often not those that are addressed on appeal. For example, since the 1930s justices have

gradually shifted attention away from economic questions and toward developing doctrines in civil liberties. However, economic issues, while they do not dominate the agenda to the extent that they used to, still play a major role in structuring the agenda. Thus, variation in issue attention is a combination of the changing preferences of the sitting justices, the political context in which they operate, and public preferences about which issues are “important.” For economic cases, I argue that the number of economic cases on the Court’s docket is negatively associated with public attention to the economy. When the public’s attention to the economy is low, the Court is less likely to feel constrained by public opinion and more willingly to turn their attention to issues other than the economy (i.e., criminal procedure, judicial power, or civil rights and liberties). Conversely, when public attention to the economy is high, the Court’s agenda will see an increase in economic cases. However, the focus here is not on whether or not the public supports the intervention of the Supreme Court into economic policymaking. Rather, it is using the state of the economy as a signal for understanding variation in judicial attention to economic issues.

While the hypotheses above correspond to the impact of public opinion on dynamic agenda-setting, they are still motivated by much of the literature explaining constraints on judicial decision-making at the micro-level. To test expectations regarding what drives macro-level issue attention, it is important to consider not just public opinion and the public’s perceptions about the state of the economy. In order to have a better understanding of what motivates agenda setting, we should also consider the effect of real macroeconomic indicators. Justices, like almost all other policymakers and citizens, prefer national economic prosperity to an economy that is suffering from high unemployment, high inflation, and low productivity. As Baum (2006) notes, justices have multiple goals, including achieving legal clarity, as well as achieving their own policy goals. Thus, examining the role of macroeconomic indicators not mediated through public perceptions can be useful in unpacking variations in issue attention over time. I hypothesize that during periods of economic prosperity, the Court’s agenda will have fewer economic cases, and more economic cases during periods of economic recession or contraction. In other words, the justices use the economy as a signal to take more or less economic cases in order to enter into the conversation

about economic policy.

Of course, the Supreme Court cannot react in real time to the current state of the economy (Brennan, Epstein and Staudt, 2009a,b). Nor can they directly seek out certain types of cases in order to support or oppose the policies instituted by Congress or the executive. Rather, the Court must wait for a case to work its way up through the lower court system and then be appealed to the Supreme Court. This process does take time, and it is possible that by the time a case that originated during one economic period reaches the Court, the state of the economy has changed. As the Court cannot react in real time, but are strategic regarding which cases are placed on the Court's agenda, we expect that when the economy is perceived to be bad, the Court grants certiorari to more economic cases. The increase in the number of economic cases on the Court's agenda suggests that the justices anticipate engaging in the conversation about economic policy, even if the economy improves in the period between when a case was granted certiorari and when the case advances to a decision on the merits. Therefore, anticipating a lagged effect of macroeconomic indicators and public opinion on Supreme Court decision making for agenda-setting makes more sense than anticipating a lag structure for decisions on the merits.³

Often, it is not clear if the Court evaluates perceptions of the national economy and economic policy and the public's preference for attention to economic issues at the time the policy was enacted or if the Court evaluates the claim raised in a case based on the current economic climate. However, these temporal dynamics are useful for understanding the influences on Supreme Court justices' behavior when deciding which cases to accept for review and how to decide the case. Earlier in the process (i.e., concurrently with current events and perceptions of the state of the economy), the justices' decision to grant certiorari to a certain case are more directly affected by public attention to perception of the state of the economy. Whereas by the time the case arrives before the Court, the influences on justices' behavior may be more affected by other actors nested within the decision making process, such as the preferences of Congress or the president.

³The selection of lag length used in this analysis was determined by examining different selection criteria including AIC, HQIC, and BIC. HQIC and BIC agree on a lag selection of one, however, because I am dealing with annual data and a small sample, I use the lag selection specified by AIC, which is four. Please see the appendix for more information on lag selection criteria.

Assessment

I examine the way that macroeconomic factors and the public's perception of the economy influences judicial decision making. The dependent variable is the count of the number of economic cases decided by the Supreme Court from 1952 through 2015. The decision to model the number of economic decisions made by the the Supreme Court's rather than proportion of economic cases in relation to all issue areas considered by the Court in any given year (as is generally the case in the literature concerning the liberalism of the Court's outputs, e.g. Casillas, Enns, and Wohlfarth 2010, McGuire and Stimson 2004, Mishler and Sheehan 1993) was made in attempt to distinguish between terms of the Court that are similar in their proportion of economic cases while being quite different in their net volume of economic decisions.

Hypothetically, a term in which the Court resolved each of its one hundred cases in a liberal direction may accomplish much more policy liberalism than a term in which the Court decides each of fifty cases in a liberal direction, although each term would be scored as one hundred percent liberal. In terms of the net number of cases, the 1984 term of the Court contained eighteen more decisions on economic cases than the 2009 term. Yet, the two terms produced similar percentages of economic cases, 24.8 percent and 25 percent, respectively. Economic cases routinely constitute approximately one quarter of all types of cases the Court decides in any given term, however the overall number of cases does differ across terms and provides additional leverage for understanding how macroeconomic conditions influence the types of cases the Court selects for review.

Moreover, reducing information about the numbers of cases in a particular direction to a percentage imposes substantive assumptions that the volume of the Supreme Court's workload is fixed over time and exogenously given. However, the Supreme Court's workload has varied substantially over time during the post-World War II Era and is largely set by the Court itself. Focusing on the volume of economic cases rather than the percentage of economic cases relaxes these implicit assumptions and allows for a more direct test of theories which involve the decisions of the Supreme Court during the agenda setting stage.

The data on Supreme Court decisions are drawn from the Supreme Court database (Spaeth

et al 2017). I rely on its compilers' identification of cases within the scope of economic issues. The cases considered economic issues include economic activity, unions, and federal taxation.⁴ The cases that are coded into the database are cases that received a grant of certiorari and were placed on the agenda. While this does limit my analysis to the cases that made it through the certiorari process⁵, there is enough variation in granted cases from term to term to help explain what motivates the Court's attention to different issue areas among terms.

Measuring Macroeconomic Factors

Because I am interested in the effect of the public's perceptions of economic conditions on judicial decision-making, I need a measure of public opinion and macroeconomic perceptions. Here, I rely on a measure that incorporates issue salience with perceptions of the state of the economy by using the Policy Agendas Project's dataset of yearly averages of the Gallup "Most Important Problem" index.⁶ The index breaks down responses to the question into 23 major topics, including "macroeconomics." Therefore, I am able to focus only on the annual percentage of respondents who identified the economy as the most important problem facing the nation.⁷ This number could theoretically range between zero and one, in my sample, the maximum is .78 with a mean of .32. While the economy does not always claim the top spot on the "Most Important Problem" question (perhaps, unsurprisingly, defense is, on average, the nation's most important

⁴These issue areas are coded as 7 "unions," 8 "economic activity," and 12 "federal taxation" according to the Supreme Court database.

⁵The Court receives between 6,000 and 8,000 petitions for certiorari every year, and grant fewer than 1 percent of those petitions. By only considering those select few cases that were placed on the agenda, I am not accounting for the full pool of potential cases that the Court could choose between. However, the variation in granted cases can still be used to explain the Court's response to variation in public opinion and changes in economic conditions over time.

⁶I could have used the Index of Consumer Sentiment (ICS) as a measure of subjective concern about the economy (e.g., Brennan, Epstein and Staudt, 2009b; DeBoef and Kellstedt, 2004). However, I chose to focus on the Gallup question because data for the ICS is available starting in January 1978, limiting the Supreme Court terms that could be included in the analysis. Additionally, more recent research has demonstrated that while the Index is a meaningful dynamic concept, it is less useful statistically than the five components that make up the index itself (Kellstedt, Linn and Hannah, 2015). Another benefit to using the Gallup measure over the ICS is that the "most important problem" responses can also be used to determine subjective perceptions of crime, so that two issue-specific papers in this dissertation are more comparable than they would with ICS as the subjective measure of the economy.

⁷The "Most Important Problem" averaged yearly summary for macroeconomics captures the aggregated proportions, on an annual basis, for all of the polls contained in the working data set. These annualized proportions were then constructed by normalizing the percentage of responses in every major topic (e.g. Macroeconomics) by the total percentage of responses in any given year (Jones and Baumgartner, 2017).

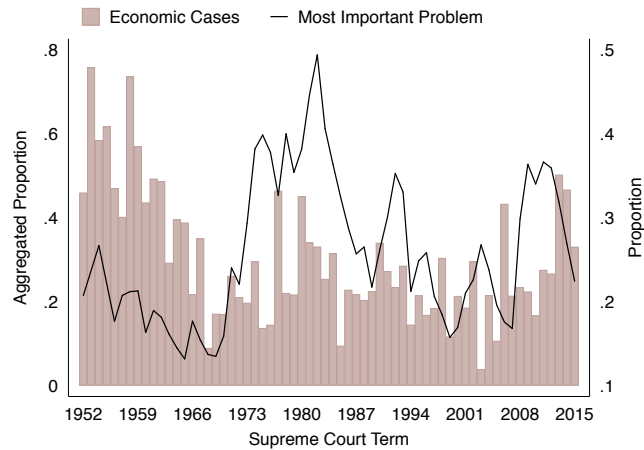


Figure 2.1: Comparing the proportion of respondents who identify the economy as the “Most Important Problem” facing the nation with the proportion of economic cases on the Supreme Court agenda.

issue), it is an issue that remains among one of the most important issues and is consistently mentioned by some percentage of Americans. The variation in salience of the economy does provide a good opportunity to compare salience with economic evaluations to determine if public opinion influences the composition of the Supreme Court’s agenda over time.

This analysis attempts to tap into the business cycle: the repeated sequence of economic expansion, followed by decline, and then followed by recovery. Previous research has suggested that the following macroeconomic variables are associated with this cycle: industrial production, consumption, investment, employment, inflation and stock prices (Brennan, Epstein and Staudt, 2009b).⁸ Nearly all of these “business cycle facts” are procyclical in that they move in the same direction as the aggregate economic activity. However, unemployment is countercyclical and real interest rates are acyclical. Timing of these variables is important and should be noted that investment activity is considered to move in advance of the business cycle, or is a leading variable. Others, such

⁸In the literature on consumer sentiment, which often leverages the public’s perceptions of the state of the national economy for understanding presidential approval rates, rather than a crude measure of the national economy as the best information of future economic benefit to expect from the incumbent, economic indicators which provide voters with information about economic growth and how it will be distributed are used. By examining these economic indicators, the literature argues that there is more leverage to understanding the relationship between public opinion, presidential approval, and policy outcomes (see Alvarez, Nagler and Willette, 2000, Barbera et al., 2014; Clarke et al., 2005; DeBoef and Kellstedt, 2004; and Linn and Nagler, 2005).

as consumption and employment are coincident economic indicators, and inflation is considered a lagging indicator.⁹ For the purpose of this analysis, I follow the selection of macroeconomic variables put forth by Brennan, Epstein and Staudt (2009b) and focus on the economic peaks and troughs identified by the National Bureau of Economic Research (NBER) Dating Committee, but focus on the one variable that taps into periods of economic expansion and contraction: the percentage change in real quarterly Gross Domestic Product (GDP).¹⁰ GDP is a useful indicator of economic health, and corresponds to the four phases business cycle: expansion, peak, contraction, and trough. When the economy is expanding, the GDP growth rate is positive. If it is growing, so will businesses, jobs and personal income. But if it expands beyond 3-4 percent, then it could hit the peak. At that point, the bubble bursts and economic growth stalls. If it is contracting, then businesses will hold off investing in new purchases. They will delay hiring new employees until they are confident the economy will improve. Those delays further depress the economy. Without jobs, consumers have less money to spend. If the GDP growth rate turns negative, then the country's economy is in a recession. With negative growth, GDP is less than the quarter or year before. It will continue to be negative until it hits a trough, or the month the economy begins to turn around again. Therefore, GDP is a comprehensive macroeconomic indicator that includes personal consumption and business investment, and can also be compared against subjective evaluations of the economy.

Figure 2.2 shows the change in macroeconomic indicators: inflation, GDP, and unemployment

⁹While these variables can be individually included into the analysis, there are also leading, coincident, and lagging indicators that can be obtained from "FRED," a public database made available by the Federal Reserve in St. Louis. The coincident indicators include nonfarm payroll employment, the unemployment rate, and average hours worked in manufacturing and wages and salaries. The trend for each state's index is set to match the trend for the gross state product. The lagging index components include: average duration of unemployment, ratio of manufacturing/trade inventories to sales, change in labor cost per unit output in manufacturing, average prime rate charged by banks, ratio of consumer installment credit outstanding to personal income, and change in the consumer price index for services. The benefit to using individual components of these series rather than the series as is from "FRED" is that I have more control over the business cycle facts included in the analysis and can directly test the effects of these facts on whether or not changes in these conditions drive judicial attention to economic cases.

¹⁰U.S. Bureau of Economic Analysis. The monthly growth rate is taken from the quarterly growth rate from the same source and is the quarterly rate three months in a row, which follows the convention/approach used in previous research. Even though the growth rate is reported quarterly, it is annualized by the BEA so it can compare growth to the previous year. In other words, in any given quarter, the BEA reports what GDP is for the year. The formula for computing the percent change from quarter 1 to quarter 2 at an annual rate is: $\left(\left(\frac{(\text{level of quarter 2})}{(\text{level of quarter 1})} \right)^4 - 1 \times 100 \right)$.

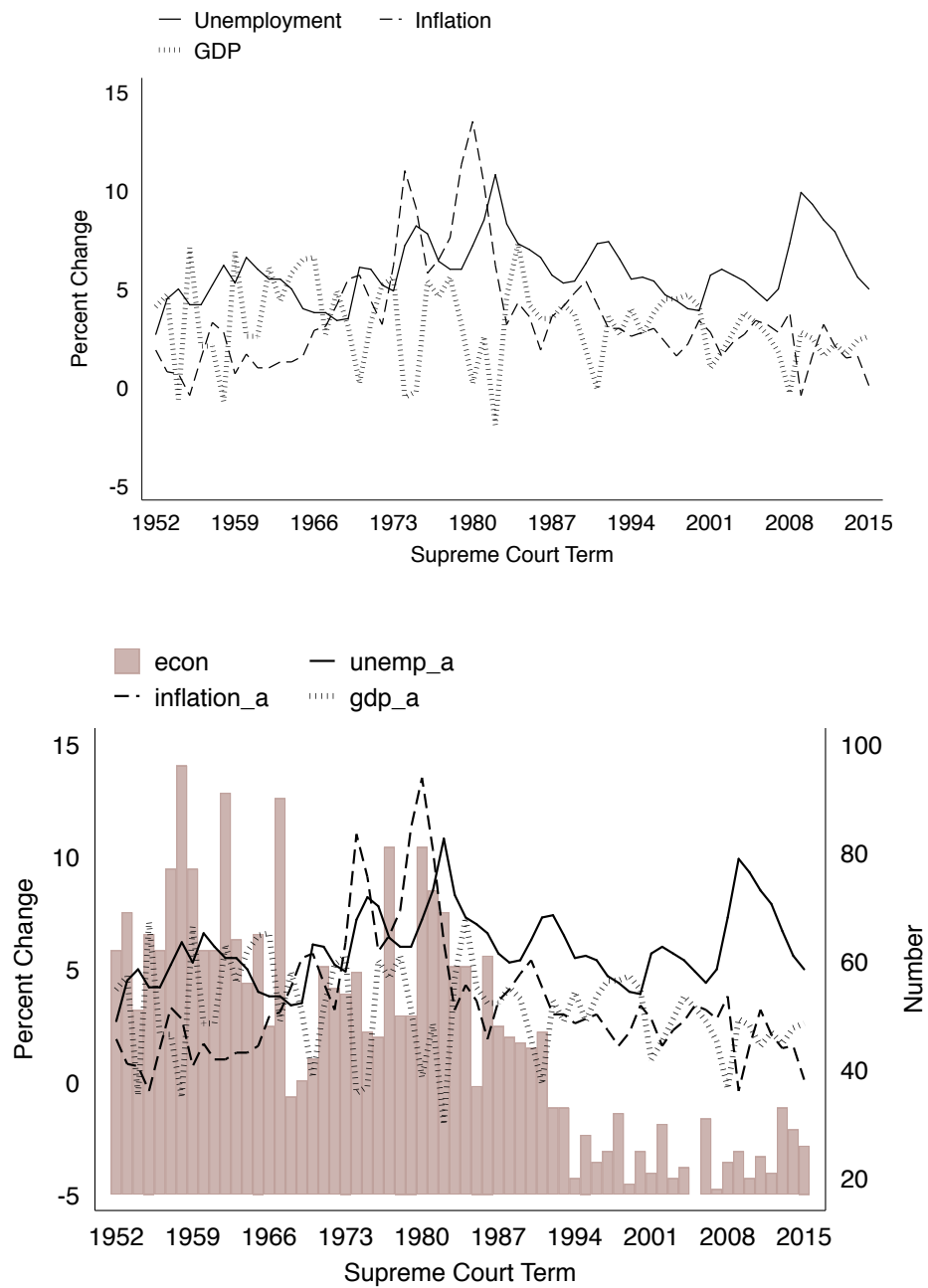


Figure 2.2: Top panel: Annual percent change in unemployment (solid line), inflation (dashed line), and GDP (dotted line). Bottom panel: Annual percent change in macroeconomic indicators compared to the number of economic cases on the Supreme Court's agenda.

from 1952 through 2015.¹¹ The top panel of this figure contains the macroeconomic indicators on their own, while the bottom panel compares these indicators to the number of economic cases on the Supreme Court's agenda. From this figure, the variation in these indicators over time is evident. Inflation and GDP are both measures that tend to mirror one another. As the percent change GDP increases, the percent change in inflation decreases, and vice versa. That these measures mirror one another makes sense considering they are both procyclical and tap into aggregate changes in economic activity. Unemployment, a countercyclical indicator, experiences ebbs and flows that appear to respond to changes in GDP and inflation. Additionally, with higher rates of unemployment and inflation, there appears to be an increase in the number of economic cases, suggesting that changes in the economy help to explain the number of economic cases heard by the Court.

Finally, I control for the ideological preferences of the justices. In order to capture dynamics, I use the Martin-Quinn score for the Court median in any term (Martin and Quinn, 2002). Because Martin-Quinn scores evolve over time, they are useful for capturing changes in issue attention. More positive values indicate a more conservative median, and more liberal values indicate a more liberal median.

2.5 Estimation

Because I want to be able to identify the components of judicial decision-making that are due to economic conditions and the components that are due to something else, I follow the modeling strategy of DeBoef and Kellstedt (2004) in my modeling choices. First, I saturate the models of economic sentiment by including multiple lags of highly collinear economic time series; and second, I do not include a lagged dependent variable. By not lagging the dependent variable, I am able to eliminate as much of the effects from the real economy from both the public's evaluations and justices interpretation of those perceptions as possible. In other words, I am able to focus on the perceptions of the state of the economy, as the real economy matters insofar as perceptions of the

¹¹Typically, changes in business cycle indicators are reported at lower levels of aggregation, either the monthly or quarterly measures. While, the existing variation is more easily observed when disaggregated, I keep these variables aggregated to the annual measure to focus on changes in issue attention on the Supreme Court agenda from year to year.

state of the economy influence interactions of the mass public with the economy. Or, perceptions carry more weight in terms of public evaluations than the state of the real economy.

The dependent variable for this analysis is the number of economic cases taken by the Court between 1952 and 2015, a count with a lower bound of zero. In the absence of strong autocorrelation or overdispersion, this type of “event count” data is typically modeled with a Poisson regression model (Brandt *et al* 2000). The annual count of federal laws invalidated since 1973 shows only weak autocorrelation ($r_{t, t-1} = 0.15$), and the time series’s estimated dispersion parameter (α) in a negative binomial regression is zero. Therefore, I estimate a Poisson regression model of the annual number of economic cases decided by the Supreme Court expressed as a function of a combination of macroeconomic and public opinion variables. These variables include the Index of Consumer Sentiment, percent change in inflation from the previous year, percent change in GDP from the previous year, percent change in unemployment from the previous year, public mood, and the overall number of both liberal and conservative decisions issued by the Court.

	Coefficient	Standard Error
GDP	-0.009	0.010
Economic Salience	0.386*	0.116
Court Ideology	-0.229*	0.037
Constant	3.748*	0.056
Log-likelihood	-460.44	
LR χ^2	42.49	
AIC	14.30	
Observations	62	

Table 2.1: Poisson Regression Model of the Number of Economic Cases on the Supreme Court Agenda, 1952-2015. * = p -value ≤ 0.05 ; one-tailed tests.

2.6 Results

The initial results from this model in Table 2.1 indicate that it is public evaluations of the economy that help explain variation in economic issue attention on the Supreme Court rather than

changes in economic growth. Specifically, as more people report that the economy is an important issue, the Court allocates more of their discretionary attention to cases addressing economic issues. This result reinforces my hypothesis that as subjective evaluations of the economy decrease (meaning more people think that the economy is performing poorly and believe that it is an important issue to be addressed), the Court is more likely to grant economic cases. In other words, the saliency of the economy appears to prompt the Court to enter into the conversation about economic policy.

Interestingly, while there is not a statistically significant relationship between the number of economic cases on the Court's agenda and changes in the country's growth rate, the negative coefficient indicates that economic growth corresponds with fewer economic cases on the Court's agenda. This provides some support (albeit weak) for my expectation that the justices, like the public, prefer a prosperous economy to one that is declining. As growth increases, the Court responds by allocating less of their attention to cases concerning economic issues.

Additionally, ideology is significant, suggesting that as the Court's ideology becomes more liberal the Court pays less attention to economic issues. This might be because a more liberal Court is less interested in economic cases and chooses to focus on different issue areas, such as civil rights. However, without modeling the relative trade-off among issue areas, no credible claim can be made from this analysis that a more liberal-leaning Court chooses to focus more on another issue area at the expense of economic issues.¹²

However, the results presented above do not account of the lagged relationship between economic performance and attention to economic cases that I presented earlier. To account for the delay in cases reaching the Supreme Court, I estimated the same model presented above with four lags to account for the contemporaneous effect, a one-year lag, two-year lag, three-year lag, and four-year lag. Accounting for the temporal structure is important because the macroeconomic indicators have different temporal effects. GDP is considered to be procyclical and a coincident indicator, which indicates what is happening with the economy contemporaneously. Additionally,

¹²An empirical analysis of trade-off relationships among issue areas on the Supreme Court's agenda is the focus of another chapter in this dissertation.

public evaluations of the economy might also have a lagged effect, as people might not realize that the economy has worsened until it has already turned negative. Taking into account the different temporal structures of these variables will help to better explain variation in attention to economic issues over time. I now proceed to model and account for those temporal dynamics.

	Contemporaneous Effect	One Year Lag	Two Year Lag	Three Year Lag	Four Year Lag
GDP	0.042* (0.012)	0.064* (0.013)	0.004 (0.012)	0.058* (0.012)	0.026* (0.011)
Economic Saliency	1.387* (0.276)	-0.208 (0.374)	0.243 (0.358)	-0.108 (0.355)	0.223 (0.269)
Court Ideology	-0.607* (0.077)	0.678* (0.120)	-0.453* (0.137)	0.272* (0.133)	-0.290* (0.083)
Constant	2.735* (0.132)				
Log-Likelihood	-390.15				
LR χ^2	216.92				
AIC	10.78				
Observations	56				

Table 2.2: Poisson Regression Model of the Number of Economic Cases on the Supreme Court Agenda, 1978-2015. * = p -value ≤ 0.05 ; one-tailed tests. Standard errors in parentheses.

Table 2.2 presents the results of the lagged effect on economic perceptions, saliency, and macroeconomic indicators on the Court's attention to economic cases. When accounting for the temporal dynamics in the data, some interesting patterns emerge. Not only are the macroeconomic indicators a significant predictor of economic issue attention, but public evaluations of the economy in previous years are not significantly related to the number of economic cases on the Supreme Court's agenda. However, the contemporaneous evaluations of the state of the economy significantly influence judicial attention to economic cases, suggesting that the Court responds more to issue saliency in the current period than saliency of the economy in previous years. Stated differently, while there is a natural lag in cases working their way through the judicial system to the Supreme Court, when the Court is choosing whether or not to take certain cases, they are more influenced by the public's current evaluations on the economy rather than evaluations of the state

of the economy in previous years. Even more simply, it the current level of salience that influences issue attention.

First, consider economic growth. With the exception of the two-year lag, this variable is a significant predictor of judicial issue attention. This means that the current levels of economic growth, and growth one, three, and four years prior influences the number of economic cases on the Supreme Court's agenda. As mentioned above, growth is a coincident economic indicator, meaning that it tells you how the economy is performing today. However, the growth rate is often revised the month after it is initially released because of the amount of data that goes in to calculating that growth rate, and the growth rate corresponds to the business cycle which is not announced until after the phase has begun, again because of the number of variables that go in to determining both the growth rate and the phase of the business cycle (expansion, peak, contraction, trough). That the growth rate and business cycle measure contemporaneous conditions, but are revised and updated after the initial announcement might account for some of the temporal dynamics captured by this model. And the Court is responding both to those contemporaneous evaluations of the economy and previous levels of growth to determine when to add economic cases to their agenda. It might be that when an economic issue comes before the Court, the justices are not evaluating the case with the current levels of growth in mind, but are actually considering the changes in economic growth when the case was initiated in the lower courts. This pattern suggests that the justices are not only concerned with their current political and economic climate, but are aware of how changes in earlier time periods might have influenced actions or behaviors that resulted in litigation, and are choosing to grant cases based on the conditions at the time the conflict occurred.

2.7 Discussion and Conclusions

The literature has long argued that the Supreme Court seeks to advance legal, political and strategic goals in the decision-making process, but has overlooked the role of the macroeconomy in structuring those goals. That macroeconomic conditions have been overlooked for so long is surprising considering the large portion of the Court's docket in any given term that is comprised of economic cases, as well as the role that economic evaluations have in the interactions between

the public, the president and Congress.

In this analysis, I have sought to fill the gap in the literature and expand on the work conducted by Brennan, Epstein and Staudt (2009) by arguing that the Court strategically evaluates macroeconomic conditions, the public's perception of the state of the real economy, and uses those evaluations to influence which cases are granted certiorari and help to promote economic stability and regulation during periods of perceived economic distress. To do this, I consider variables designed to take note of the state of the economy—inflation, GDP, unemployment and consumer confidence—as well as a measure of public issue attention and concern for the national economy. I expected to find that public perceptions of the state of the economy matter for the Court the same way they matter for the president or Congress. Specifically, when the economy is perceived of as being good, presidential approval ratings are higher, but when the economy is perceived of as being bad, the president is punished with lower approval ratings. I expected this to manifest for the Court through an increase in the number of economic cases on the Court's agenda when the economy is perceived as bad.

Interestingly, these results indicate that economic conditions matter to the Court in a similar way in which they matter to elected members of the government. However, the Court, unlike the President and Congress, are not as driven by public perceptions of the economy. Maybe it is because the justices are not directly affected by elections and the public rewarding or punishing incumbents based on the state of the economy, that the public's response does not matter for the Court. Perhaps the Court is more attentive to macroeconomic indicators because they believe that the public is not as invested in the Court addressing these types of issues compared to other issues, such as gay marriage, gun rights, conflicts between states, and criminal procedure. Or perhaps it is because members of the Court cannot be voted out of office if the public does not like or support a decision they make which concerns economic policy. These results do suggest, however, that the Court's attention to economic issues is driven, in part, by the real economy.

Further, the results of this analysis indicate that economic growth has persistent effects on judicial issue attention. More specifically, changes in growth from year to year is associated with

greater attention to the economy in the Supreme Court's docket over several years. That there is an effect of GDP contemporaneously, one year prior, three years prior, and four years prior suggests that the Court is sensitive to changes in macroeconomic conditions that have more of a direct and immediate impact on the public. Together, these results point to an interesting temporal dynamic within the Supreme Court's decision making process: because the Court cannot immediately react to changes in political or economic conditions and have to wait for a case to work itself up through the legal system, the justices take into consideration the state of the economy contemporaneously and at the time a case was first brought to court for evaluating whether or not to become involved with the discussion on economic policy.

What does this mean for agenda setting? These results indicate that there is a meaningful association between the state of the national economy and the linked political processes that bring cases before the Supreme Court. More specifically, when the economy contracts (an increase in unemployment and inflation and a decrease in GDP), the Court's attention to economic cases increases. While this analysis has helped unpack the influences on issue attention on the Supreme Court, it is limited in that it only considers a single issue area. In other words, by just focusing on one issue area before the Court, we still do not have a sense of how economic issues change in relation to other issues such as criminal procedure and civil rights. When the economy is not a salient concern for the public, to which issues does the Court turn to? Further, focusing only on one issue domain also does not tell us anything about the overall composition of the Court's agenda and how it is allocated across different issue areas within one term and over time. In order to better understand the dynamics of issue attention, the next useful step would be to empirically model and account for trade-offs among issue areas and what internal and external influences motivate those discretionary trade-offs decided on by the members of the Supreme Court.

This analysis was a first step in explaining dynamic issue attention on the Supreme Court. Effects of the macroeconomy and public perceptions of the economy at shorter lags show Court's instantaneous response to economy, while effects at longer lags might account for the strategic behavior of other actors within the judicial system, such as litigants and lower court judges. The data

I analyze cannot adjudicate between these differences. Further research is necessary to examine the effect of the economy on the structure of the Court's docket, and decisions made earlier in the adjudication process to understand when and why the Supreme Court is used as a venue for the resolution of economic conflicts.

3. IT'S TEMPERMENTAL: ATTENTION TO CRIMINAL PROCEDURE ON THE U.S. SUPREME COURT

Attention is a fundamental feature of agendas and policy processes. The dynamics of attention are closely linked with the selection of problems for active consideration on governmental agendas and the stability of policy systems. Further, the allocation of attention indicates the preferences of actors within a political system. The Supreme Court is an interesting institution from which to study issue attention because it is unique among institutions that sit at the apex of their branch of government because the justices can set their agenda, but not build their agenda. Agenda building is the ability to create new issues to place on an agenda, whereas agenda setting is the ability to include or exclude items from an agenda (Cox and McCubbins, 2005). Because of the Court's ability to choose among questions to resolve in different issue areas, the amount of attention given to a particular issue changes over time.

The sociopolitical environment in which the Supreme Court operates is a dynamic one in which mass and elite opinions are assumed to play an important, direct role in shaping judicial outcomes, if only at the margins. And because the Court resolves cases and controversies that implicate many issues important to the mass public and political elites, there is a question of whether the Court is responsive to those preferences. This relationship is often characterized as the countermajoritarian difficulty. As expressed by Bickel (1986), the countermajoritarian difficulty involves the tension between the Supreme Court as an appointive, policy-making institution and the ideas of representative government.

One area in which this difficulty can be examined is the issue of criminal procedure. The contemporary Supreme Court (beginning in the 1960s with the Warren Court) began to constitutionalize criminal procedure, and the doctrine of the Warren Court was further expanded and contracted by the Burger and Rehnquist Courts. At the same time, public attention to law and crime experienced a lot of dynamic movement, peaking in the late 1960s and again in the 1990s, corresponding with increased attention to crime by elected politicians, suggesting that the systemic

(public preferences) and institutional policy agendas were interacting with one another. Because of the shifts in preferences within these two different agendas, and the Supreme Court's unique position to interact and be influenced by both, allows for an examination of the dynamics of judicial attention to criminal procedure over time.

Here, I argue for a temporal theory of issue attention by the U.S. Supreme Court, motivated by both public and elite preferences. Discretionary jurisdiction, or the ability of the justices to select which issues they want to resolve and when to grant review, provide the justices with more control over when to engage with an issue salient to the public or the other branches of government. While there is substantial evidence that members of the Court are motivated to grant review on a case-by-case basis (e.g., Black and Owens, 2009a; Caldeira and Wright, 1988; and Epstein, Martin and Segal, 2012) , these accounts disregard dynamic agenda-setting as a macro-political process motivated by changes in institutional and public preferences that underscores agenda-setting in other American political institutions (Baumgartner and Jones, 1993)). Even though Supreme Court justices are appointed rather than elected, expecting political elites to not respond to the preferences of other elected officials and members of the public undermines the idea that the Court operates as a member of the national government. Contextual changes in the nation's political life also likely influence which issues the Court believes should be resolved, and the ability of the Court to shape the direction of national policy.

Broadly, this perspective supports three predictions about the dynamics of issue attention on the Supreme Court. First, the Supreme Court's issue attention should shift towards policy domains over which Republicans exert greater issue ownership as the membership of the Court becomes more conservative, and, conversely, the Court should pay greater attention to policy domains over which Democrats have stronger issue ownership as the Court becomes more liberal. Second, the Court's issue attention should follow public perceptions of problems in the political and social environment, leading the Court to take more cases in areas where the American public identifies important national problems. Finally, the Court's issue agenda should respond to changes in the political and social environment that produce changes in the volume of litigation activity in particu-

lar policy domains, influencing the composition of the set of cases from which the Court constructs its docket and, therefore, its issue agenda.

I develop these general expectations as predictions about the Supreme Court's attention to issues related to criminal procedure. First, I expect that attention to criminal procedure will be positively related to greater conservatism among the justices. Second, I expect that greater public attention to law and crime will increase the Court's attention to criminal procedure cases. Third, my theory predicts that as Congress passes more laws dealing with changes in treatment of criminal defendants or aspects of the criminal procedure process, the Court will increase the attention given to issues within criminal procedure.

I evaluate these expectations by examining the Supreme Court's attention to criminal procedure issues from 1952 to 2015. I estimate a statistical model of the number of Supreme Court cases related to law and crime according to the Supreme Court Database in each term as a function of the expressed ideology of the Court's justices, Americans' perception of law and crime as the "most important problem" facing the country, the number of laws passed by Congress concerning law and crime, and changes in the actual crime rate. The data provide support for my theoretical expectations. As expected, the Supreme Court's attention to law and crime issues is positively related to the proportion of Americans who regard law and crime as the nation's most important problem and also to the amount of law and crime legislation to emerge from Congress. Additionally, the data indicate that the presence of a Republican president is positively related to the amount of attention allocated to criminal procedure cases. However, the data do not support my expectation that greater ideological conservatism is related to an increase in judicial attention to criminal procedure issues.

These results indicate that issue attention by the Supreme Court is systematically associated with macro-political dynamics which structure both public preferences and other institutional preferences. Additionally, these results imply that the Court are at least responsive to majority preferences when setting their agenda. Further, these results provide a more comprehensive picture of the relationship between the U.S. Supreme Court and the broader dynamics of the American

political system.

3.1 Dynamic Agenda-Setting on the Supreme Court

The United States Supreme Court is a unique political institution in that it has the ability to set its own agenda without needing to justify or explain their decisions to any one. Put differently, since 1925, the justices of the Supreme Court have the ability to decide which issues they want to resolve and when they will address those issues. Because of this discretionary jurisdiction, a reasonable amount of variation in issue attention is expected to occur from term to term. Therefore, it is useful to connect judicial agenda-setting with the concept of attention diversity, which is the degree to which attention on an agenda is distributed across all items, from complete concentration (a single item receiving all attention) to complete diversity (all items receiving an equal level of attention) (Boydston, Bevan and Thomas, 2014). Previous work on attention diversity suggests that diversity of attention across policy issues on a given institutional agenda can affect, among other things, how the agenda changes over time (e.g. Baumgartner and Jones, 1993). Attention diversity is important because, as in the case of most agendas, each bit of attention paid to an issue is one bit less attention paid to everything else; that is, agenda-setting is a zero-sum game (Zhu, 1992). However, Lipsmeyer, Philips and Whitten (2017) contend that attention diversity in political budgeting is an expression of the relative importance of policy priorities, suggesting that agenda-setting does not always have to be a zero-sum game. From the perspective of Supreme Court agenda-setting, the Court may desire to alter the composition of their agenda to fit their ideological or partisan priorities; however, their ability to do this may be constrained by the preferences and priorities of the other branches of government, as well as public opinion, or the systemic agenda. The degree to which the Court responds to the preferences of other actors depends on the types of issues they choose to address in any given term.

Previous research attempting to link the institutional agenda to the systemic agenda points to several patterns of attention diversity within the United States. One pattern could be the “hierarchical” pattern (March and Olsen, 1976) in which attention to issues moves over time in a nonrandom sequence between the systemic and institutional agenda as a series of linked stages with feedback

loops. In this pattern, institutional agendas often lag behind changes in the systemic agenda. However, rather than movements between agendas occurring in a democratic, bottom-up fashion, they could occur in an elitist, top-down manner, where the institutional agenda leads to changes in the systemic agenda. If these movement patterns occur in a top-down fashion, then there needs to be consideration of specialized patterns of agenda movement between the three branches of government before those movements trickle down to the public agenda. For example, presidents attention might direct congressional attention because of the jointly coupled nature of the policymaking process, and the president's attempt to implement their issue agendas through the legislative process (Fishel, 1985). Additionally, a president might attempt to influence the Supreme Court's agenda through the solicitor general (Caldeira and Wright, 1988; Caldeira, Wright and Zorn, 1999). However, congressional priorities may affect the president's agenda as members of Congress can seek to increase attention to issue areas by cooperating or competing with the president (Jones, 1975; Kingdon, 1989). And, broadly speaking, Congress shapes the composition of the Supreme Court's agenda through the passage of laws. In the long run, both the president and Congress jointly influence the Court's agenda by changing policy preferences on the bench through appointments (Epstein and Segal, 2005; Pacelle, 1991, 1995). While the influence of the Court on the other branches is less well documented, the Court's decisions can alter the attention paid to certain issues, especially through the media (Flemming, Bohte and Wood, 1997b; Ura, 2014). Further, in one of the few studies to examine the macrodynamics of agenda-setting on the Supreme Court, Flemming, Bohte and Wood (1999) find that in the areas of civil rights and civil liberties, the Court actually helps to structure attention to this issue both across national political institutions and for public opinion.¹

In line with a lack of evidence regarding the Court's influence on the institutional agenda of the

¹While this is an important finding in regards to understanding attention to issue areas over time, Flemming, Bohte and Wood (1999) only consider three issue areas: civil rights, civil liberties, and the environment. The authors acknowledge that the issues were intentionally selected to be salient to all three national political institutions, which limits the ability to generalize across different issue areas. Further, each of these issue areas were analyzed separately, only capturing the dynamics in each individual issue area rather than the dynamics of the Court's agenda as a whole. Accounting for the dynamics of the complete agenda is something that a later chapter of this dissertation will address in more detail.

other branches, Epstein, Segal and Victor (2002) find limited support for a relationship between the long-term dynamics of the Court's agenda and congressional preferences; the Court grants fewer statutory cases when it is more out of step with Congress. The authors do note that their results are limited to explaining broad aggregate trends in the data, which might miss the nuances of the micro-level approach to certiorari², but better help to explain variations in issue attention over time. Adding to the understanding of the relationship between the Court and Congress, Owens (2010) examined all existing spatial models positing a separation of powers constraint on the Court's agenda. He finds no evidence that justices respond to the preferences of Congress when deciding what to decide.

Additionally, the evidence of a separation of powers effect at the merits stage is also mixed. Sala and Spriggs (2004); Segal (1997); and Spriggs and Hansford (2001) all suggest that justices merely vote their sincere preferences at the merits stage, and, occasionally, those preferences align with the will of the elected branches. Thus, any apparent relationship between the two is congruence rather than constraint. Scholars who do find that there is a separation of powers effect at the merits stage suggest that the effect is mediated through some other source. For example, Clark (2009) find the Court is less likely to invalidate a piece of federal legislation when there is a higher rate of bills introduced in Congress to curb the Court's power. Clark argues that rather than responding directly to the threat of Court curbing, justices take increased negative attention by members of Congress as a signal that it is out of step with the American people, endangering their institutional legitimacy. And Hall (2014) explores the impact of congressional influence and finds that justices are motivated by a fear of nonimplementation of their decisions, which is stronger in lateral cases versus horizontal cases.³

²the factors that make an individual case more or less likely to receive certiorari. These factors, such as disagreement between lower courts (Beim and Rader, 2018; Epstein, Martin and Segal, 2012; Ulmer, 1978); attempts to induce compliance within the judicial hierarchy (Boucher and Segal, 1995; Caldeira and Wright, 1988; Caldeira, Wright and Zorn, 1999; Cameron, Segal and Songer, 2002); the involvement of the Solicitor General and interest groups (Caldeira and Wright, 1988; Caldeira, Wright and Zorn, 1999), signals from lower courts such as dissents on the panel, the use of lower court judicial review, or en banc review (Black and Owens, 2009a; Owens, 2010) have provided a comprehensive overview of which cases are selected for review.

³Vertical cases usually involve situations where the Court can produce policy changes by requiring a procedure for, or establishing immunity from, criminal prosecution or civil liability. Here, implementation primarily occurs within the judicial hierarchy and through the actions of lower court judges. Lateral cases involve situations where lower-court

Regarding the systemic agenda, there is stronger evidence that the Court is effectively constrained by public opinion at the merits stage. In line with a bottom-up hierarchical pattern of issue attention (March and Olsen, 1976), McGuire and Stimson (2004) suggest that the Court is responding to the same shifts in macro public opinion as the mass public over time. However, Casillas, Enns and Wohlfarth (2011); and Giles, Blackstone and Vining (2008) claim that any constraint of public opinion is due to support for the Court as an institution, hinting that the connection between the systemic and institutional agendas is less hierarchical and more reciprocal. However, previous research are focused on the micro-level processes that indicate certworthiness, making the assumption that there is no meaningful variation in either American public opinion or judicial attention across issue areas. In examining the relationship between issue salience and issue specific mood, Bryan (2014) demonstrates that the justices are, in fact, responsive to public attention to issues at different rates. Specifically, issues that receive little mention by members of the public as being salient issues are less likely to receive a writ of certiorari, while issues that dominate public attention are more than three times more likely to receive a vote to grant by the justices. These findings, taken together with Flemming, Bohte and Wood's (1999) finding that in certain issue areas (especially civil rights and liberties) actually help set the policy agenda by focusing attention to specific issues, suggest the importance of considering issues as vehicles for understanding policy preferences of the justices and constraints on the nested stages of decision-making rather than focusing on individual case-specific factors.

3.2 Understanding the Role of the Supreme Court in Shaping the Criminal Justice System

According to Willaims (1985), criminal procedure serves three general functions. First, criminal procedure must provide a process that vindicates substantive criminal law goals. This procedural mechanism must determine substantive guilt reliably, authoritatively, and in a manner that promotes the criminal law's sentencing objectives. Second, criminal procedure must provide a dispute resolution mechanism that allocates scarce resources efficiently and that distributes power

judges play no inherent role in the policy process, and do not directly control implementation. See Hall (2011) for a more detailed explanation on the distinction between vertical and lateral cases.

among state officials. Finally, criminal procedure can perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes. Criminal procedure can serve this function by articulating fair process norms that attempt to validate the state's exercise of coercive power over its citizens.

The horizontal division of labor in America's criminal justice system is rather straightforward. Legislators write the laws that define crimes and sentences. They also write budgets for the agencies: police forces, prosecutors' offices, public courts, and prisons. Police officers decide when and arrest. Prosecutors decide whom to charge and how severely. Judges interpret the laws legislators write, and exercise whatever sentencing discretion those laws give them.

However, the vertical division of labor becomes much more complex. The complexities arise because the bulk of the work (from arrests to litigation, adjudication, and sentencing) occur within the state system. Additionally, as Stuntz (2006,p.787) points out, nearly all "local arrests and prosecutions are governed criminal codes and state sentencing rules. State legislators are primarily responsible for those codes and rules, though they sometimes delegate a sizeable measure of their sentencing power to sentencing commissions or judges. Congress defines federal crimes and sentences, with the help of the Federal Sentencing Commission. Over time, members of Congress have tended to exercise more power and the Commission less." However, the Supreme Court's decision in *United States v. Booker* (2005) shifted power away from Congress and more to the judiciary by retaining the Federal Sentencing Guidelines, but establishing a new and more flexible reasonableness standard of review.

Additionally, constitutional law itself has contributed to the complexities inherent in the vertical allocation of labor and power within the criminal justice system. The Fourth and Fifth amendments largely govern police searches and seizures and interrogation of suspects. Here, state and federal statutes play a significant role, largely because the Supreme Court has expressly declined to regulate some of the issues within these areas.⁴ Additionally, constitutional law governs most trial

⁴For example, under the Fourth Amendment, the Court has held that government access to "pen registers" that recorded the phone numbers dialed by the defendant did not infringe the defendant's reasonable expectation of privacy

procedures including the scope of the right to a trial by jury, jury selection, burdens of proof, and the right to confront opposing witnesses (Stuntz, 2006, p.790). And the Sixth amendment right to effective assistance of counsel regulates the quality of representation defendants receive. In other words, the processes that occur after a crime has been committed and is in the process of litigation, constitutional law has created a good roadmap for how criminals should be treated. By contrast, constitutional law places very few limits on crime definition, with the exception of crimes that involve speech, consensual sex, or reproduction (which are but a small proportion of all crimes).⁵

The Supreme Court has certainly played a large role in shaping American constitutional procedure, but both their attention to criminal procedure and the scope of their decisions has changed over time. The Warren Court began the constitutionalization of criminal procedure in the 1960s. The Warren Court acted as the criminal justice system's moral conscience by articulating ideals that should regulate the conduct of criminal justice officials in investigating criminal activity and adjudicating guilt; but these norms espoused by the Court were not novel or out of line with public preferences (Israel, 1977; Saltzburg, 1980; Seidman, 1980). What made the actions of the Warren Court stand out was that the Court was now more willing to apply federal constitutional norms to state criminal justice systems by selectively incorporating them through the due process clause of the fourteenth amendment. The Court attempted to implement these norms by granting criminal defendants procedural safeguards at the police station⁶, at line-ups⁷, at trial⁸, and on appeal⁹. Some of these safeguards promoted the system's capacity to adjudicate guilt more reliably¹⁰; while oth-

Smith v. Maryland (1979); the government may search newsrooms under the same Fourth Amendment standards that apply to all other searches and seizures *Zurcher v. Stanford Daily* (1978); no constitutionally protected privacy interest is infringed when the police obtain information from a third party: e.g., *California v. Greenwood* (1988); and that the Fourth Amendment protects "reasonable" privacy expectations *Kyllo v. United States* (2001).

⁵See *Texas v. Johnson* (2003) invalidating criminal flag burning statute; *Lawrence v. Texas* (2003) invalidating criminal sodomy statute; and *Roe v. Wade* (1973) invalidating criminal abortion statute.

⁶*Miranda v. Arizona* (1966)

⁷*United States v. Wade* (1967), defendant has right to counsel at post-indictment line-up.

⁸*Griffin v. California* (1965), Fifth amendment forbid both comment by prosecution on defendant's refusal to testify and instructions to jury that defendant's trial silence is evidence of guilt.

⁹*Douglas v. California* (1963), indigent entitled to appointed counsel at state mandatory appeal stage; *Griffin v. Illinois* (1956), indigent defendant has right to obtain free trial transcripts in order to ensure adequate appellate review.

¹⁰*Stovall v. Denno* (1967), due process mandates exclusion of out-of-court identification based on unnecessarily suggestive identification procedure; *Pointer v. Texas* (1965), defendant has constitutional right to confront and cross-examine witnesses at trial; *Brady v. Maryland* (1963), prosecutor has duty to disclose exculpatory evidence to defendant at trial, which effectively expands the government's disclosure of discovery requirements

ers restricted the state's capacity to detect and punish offenders in order to ensure that the criminal process treated all criminal suspects equally and with dignity and respect.¹¹

Further, the Warren Court expanded the federal courts' habeas corpus power to consider federal constitutional claims denied by state courts in an attempt to encourage lower courts to engage more with these fair process norms coming out of the Supreme Court, which itself was more restricted in terms of the number of criminal procedure cases that could be heard each term. As Arenella (1983, p.190) points out, "this expansive view of habeas corpus provided a federal forum for the protection of fair process norms that state courts might have been reluctant to enforce because of the norms' tendency to frustrate the state's capacity to determine guilt reliably ...ensuring that some meaningful federal-state dialogue concerning the elaboration of these norms would occur." Through a variety of sub-issues within the larger umbrella of criminal procedure, the Warren Court was championing the theme of due process, and the equal and fair treatment of criminal defendants.

At the same time the Warren Court was implementing these procedural safeguards, crime rates were escalating and the public was becoming more anxious about the criminal justice system's ability to protect citizens from street violence (Flamm, 2007, p.2). The Court became a scapegoat because the justices were unable to enter the public forum to answer questions and concerns brought up by members of the public, unlike politicians. One of the Court's harshest critics was Richard Nixon who alleged that the Warren Court was soft on crime, and used decisions made by the Court to help structure his campaign on law and order. Nixon's ability to capitalize on the public's belief that procedural technicalities were preventing the policy from stopping crime helped secure his election, along with his campaign promise to appoint "law and order" justices who would narrow the scope and practical effect of decisions like *Mapp v. Ohio* (1964) and *Miranda v. Arizona* (1966) (Aranella, 1983). In appointing Warren Burger as the new Chief Justice, and appointing Harry Blackmun, Lewis Powell, and William Rehnquist all by 1976, Nixon fueled the fears of the proponents of the Warren Court that a conservative "counter-revolution" was about to occur in the area of criminal procedure. Especially when he made it clear that a reason he ap-

¹¹ *Miranda v. Arizona* (1966), "the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.

pointed Warren Burger to succeed Earl Warren was due to Burger's conservative views about law and order.

The Burger Court quickly began to criticize many of the procedural safeguards put in place by the Warren Court, especially those that made it more difficult for the criminal justice system to determine factual guilt quickly and conclusively (see *Schneekloth v. Bustamonte* (1973)). Additionally, the Burger Court undermined the constitutional rationales of both *Miranda* and *Mapp*. In *Michigan v. Tucker* (1974) and *Oregon v. Haas* (1975), the Court permitted statements taken in violation of *Miranda* to be used as impeachment evidence by finding that a police violation did not constitute a "core" violation of the privilege against self-incrimination. In *United States v. Calandra* (1974) and *United States v. Janis* (1976), the Court concluded that *Mapp*'s exclusionary rule was not a personal constitutional right of the defendant, and only applied the rule to procedural contexts in which the rule's speculative deterrent benefit outweighed its tangible cost of excluding reliable evidence. And while these decisions seemed to suggest that the Burger Court would completely overturn the protections developed by the Warren Court, the Burger Court actually set about narrowing the scope of Warren Court precedent rather than overturning precedent.

However, it was the Rehnquist Court that started to chip away more concretely at the protections developed by the Warren Court, as the Rehnquist Court shifted the focus from criminal defendants to law enforcement. In particular, through decisions in *Pennsylvania v. Muniz* (1992) and *Dickerson v. United States* (2000), the fundamental doctrine of *Miranda* has become one that allows the police to work around with little to no difficulty. Absent physical abuse or other obviously coercive interrogation techniques, administration of *Miranda* warnings essentially dooms to failure any claim by the defendant that his confession was involuntary (Smith, 2002). Perhaps more notably, the Rehnquist Court developed the habeas anti-retroactivity doctrine in *Teague v. Lane* (1989) by stipulating that habeas corpus would only be used to enforce "old" law, preventing claims seeking "new law" in any habeas cases with the exception of extraordinary circumstances, making it exceptionally difficult for state court prisoners to get their claims heard on the merits in federal court (Smith, 2002, p.1345).

What this discussion demonstrates is that the criminal procedure is an exceptionally dynamic issue area. There are lots of moving parts—law enforcement behavior, legislative crime definition, legislative funding-allocation decisions, prosecutorial charging and plea-bargaining decisions—that can and do adjust in response to court decisions. And the constitutionalization of criminal procedure really began with the Warren Court, which Seidman (1980, p.436-437, 445) argues used criminal procedure to serve “unrealistically broad social ends”—racial justice, economic equality, and limited government—that had little to do with criminal procedure’s “central mission” of reliably determining guilt and innocence. Those decisions were criticized a lot by the Burger Court, but it was not until the Rehnquist Court that much of the protections given to criminal defendants were rolled back. However, in understanding the development of law in this area, it is important to consider that much of criminal procedure—whether under Warren, Burger, Rehnquist or Roberts—has not involved constitutional interpretation in the sense that we know it from other areas of constitutional law. Rather, “constitutional criminal procedure tends not to be guided by the usual theories of constitutional interpretation, such as textualism, representation reinforcement, originalism, or tradition. Instead, interest-balancing takes center stage in criminal procedure, and has for decades” (Smith, 2002, p.1350) . It is that interest-balancing that helps to explain the ebb and flow of judicial attention to criminal procedure over time.

Attention to Crime

The control of crime has largely been the responsibility of local law enforcement throughout the history of the United States (Flamm, 2007). However, there have been numerous periods where crime has become more of a federal concern. In response to widespread concern about immigration and crime in the 1920s and 1930s, there were bureaucratic efforts to create and enlarge the scope of the Federal Bureau of Investigation, which coincided with an increase in the federal government’s responsibility for crime during this period (Walker, 1977). However, the salience of crime as an important issue quickly attenuated, and crime did not emerge as a major national political issue until the 1960s. During the 1964 presidential campaign, Barry Goldwater emphasized the increase in “street crime” and linked such crime to social unrest, permissive courts, and declining moral

standards (Beckett, 1994, p.426). However, it was Nixon who really connected the Republican party with being tough on law and order, allowing the Republican party to dominate the crime issue for close to thirty years.

During the 1970s, law and order faded from the limelight, as conservatives, with a Republican in the White House, had little interest in portraying local safety as a national responsibility, particularly when the crime rate rose steadily from 1969 to 1971 (Flamm, 2007). Further, the Watergate Crisis tarnished the law-and-order credentials of the Nixon administration, while attention shifted to a weakening national economy. However, the Republican “get tough” narrative continued to focus on street crime and define that type of crime as the consequence of declining moral standard. But the Reagan and H.W. Bush administrations gradually began to link street crime to the increase in drug use, and defined the drug problem as a criminal issue rather than a public health or social issue. As Beckett (1994, p.426) points out, the “public came to support increased law enforcement efforts, harsher sentences, and the contraction of civil rights for alleged drug offenders as the appropriate solution to the drug problem.”

Interestingly, crime, while consistently in the top five most important issues facing the nation (Jones and Baumgartner, 2017), was not registering with most Americans as being the most important issue during this period. As Figure 3.1 indicates, more Americans were concerned about crime in the 1960s and the 1990s than when the Republican narrative was shifting to framing crime in light of the drug problem. Because the Supreme Court is affected by public opinion, and the Court hears cases regarding the crime rate and procedures within the criminal justice system, examining the effect of changes in the reported crime rate and public perceptions of those changes provides an opportunity to understand ebbs and flows in attention to criminal procedure cases by the Court over time. I turn now to exploring the implication of variation in issue attention and developing a series of expectations concerning when and how justices should respond to variations in both the systemic agenda (public preferences) and the institutional agenda regarding the crime rate and criminal justice system when choosing which cases to hear.

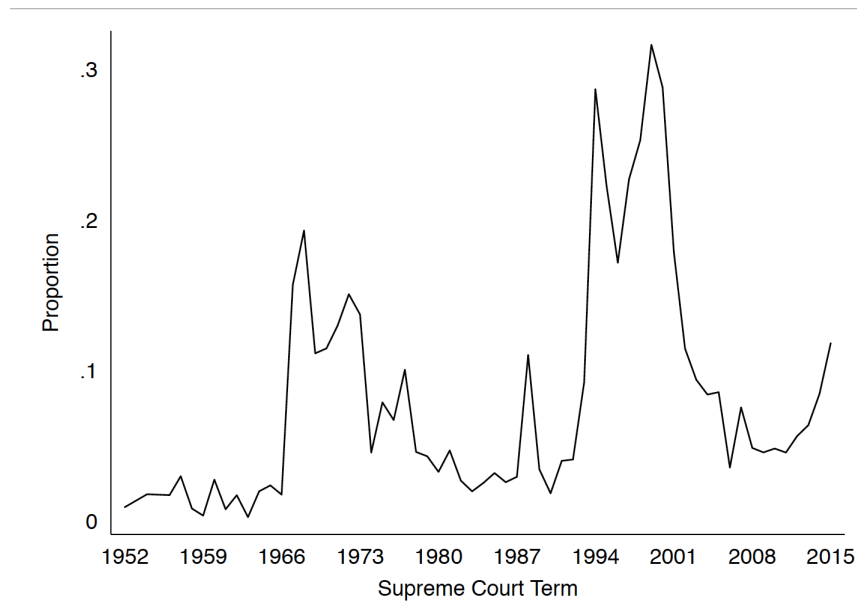


Figure 3.1: Responses to Gallup’s “Most Important Problem” Question identifying crime as the most salient issue

3.3 A Theory of Temporal Issue Attention

My theoretical argument begins from the premise that agenda-setting is about the temporal policy choice made by whole political systems (Jones and Baumgartner, 2005). For the Supreme Court, the ability to set their agenda is based on a combination of internal and external considerations, as outlined above. However, rather than examining those constraints on a case-by-case basis, incorporating a macro-level framework provides the opportunity to explain dynamic issue attention over time by considering groups of cases as organized into issue areas, which better represent the justices preferences for entering into the policy conversation by producing changes in the law. Here, discretionary jurisdiction, or the ability of the justices to select which issues they want to resolve and when to grant review to cases in the broader issue area provide the justices with more control over when they engage with an issue salient to the public or the other branches of government. Further, a macro-level approach to explaining judicial issue attention incorporates the concept of issue fluidity (McGuire and Palmer, 1995,1996). Issue fluidity speaks to the ability of judges to transform the issues in the cases they decide because of the malleability inherent in

questions of law. The questions resolved at trial level are often not those that are addressed on appeal. Since the 1930s, justices have gradually shifted attention away from economic questions and toward developing doctrines in criminal procedure and civil liberties. While criminal procedure issues dominated the Court's agenda from the late 1960s through the mid 1980s, these issues still play a major role in structuring the Court's agenda from term to term. Thus, variation in issue attention is a combination of the changing preferences of the sitting justices, the political context in which they operate, and public preferences about which issues are "important." In other words, it is the interaction between institutional and systemic attention that provide a better understanding of variation in judicial attention over time.

For criminal procedure cases, I argue that the number of criminal procedure cases on the Court's docket is positively associated with public attention to crime, as indicated by the percentage of survey respondents who identify law and crime as the most important problem facing the United States. When the public's attention to crime is low, the Court is less likely to feel constrained by public opinion and more willingly to turn their attention to issues other than crime (i.e., economics, judicial power, or civil rights and liberties). Conversely, when public attention to crime is high, the Court's agenda will see an increase in criminal procedure cases. However, the focus here is not on whether or not the public supports the intervention of the Supreme Court into determining the direction of policymaking and treatment of criminal defendants within the criminal justice system. In other words, the public's response to changes in the crime rate increases the salience of crime on the systemic agenda can be used to explain variation in judicial attention to criminal procedure.

Additionally, I expect there to be a positive relationship between the institutional agenda and the number of criminal procedure cases on the Supreme Court's agenda. Specifically, I expect the relationship between the number of cases on the Supreme Court's agenda and the number of crime laws passed by Congress to be sequential. In other words, an increase in the passage of statutes concerning crime will lead to an increase in the number of criminal procedure cases granted review in subsequent terms as the Court will respond to questions challenging some constitutional

provision of those laws. This speaks to the idea that a shift in issue and policy attention in one branch of government help to structure issue attention in the other branches (Flemming, Bohte and Wood, 1999). Further, because of the well established position of Republican presidents as being tough on crime, I expect there to be a positive effect of Republican presidents on the number of criminal procedure cases granted review by the Supreme Court. This could be due to two competing explanations. First, the Court feels the need to reinforce the preferences and policies established by the administration, either out of loyalty to the president (see Epstein and Posner, 2016), or to reduce interbranch conflict (see Hall and Ura, 2015). On the other hand, the Court might wish to curtail the effects of new crime legislation enacted by either the president or Congress, or the Court believes that elected politicians are not adequately protecting the interests of criminal suspects and defendants (Stuntz, 2006). This analysis does not attempt to adjudicate between these competing explanations, but demonstrate that the institutional agenda of the other branches of government is a explanation for variation in the Supreme Court's attention to criminal procedure.

Due to the structure of the judiciary, the Supreme Court cannot react in real time to the current crime rate, nor can they directly seek out certain types of cases in order to support or oppose the policies instituted by Congress or the executive. Rather, the Court must wait for a case to work its way up through the lower court system and then be appealed to the Supreme Court. This process does take time, and it is possible that by the time a case that originated during one period where both the public and other branches of government were more attentive to issues of law and crime reaches the Court, the systemic and institutional attention has shifted to another issue area. As the Court cannot react in real time, but are strategic regarding which cases are placed on the Court's agenda, we expect that when crime is perceived to be a problem, the Court grants certiorari to more criminal procedure cases. The increase in the number of criminal procedure cases on the Court's agenda suggests that the justices anticipate engaging in the conversation about law and crime policy, even if they cannot engage in that conversation immediately. Therefore, anticipating a lagged effect of systemic attention, institutional attention, and the crime rate on Supreme Court decision making for agenda-setting makes more sense than anticipating a lag structure for decisions

on the merits.

3.4 Data and Methods

I examine the effect of the crime rate, congressional attention to crime, and the public's perception of crime on judicial decision making. The dependent variable is the count of the number of criminal procedure cases decided by the Supreme Court from 1952 through 2015. The decision to model the volume of criminal procedure decisions made by the the Supreme Court's rather than proportion of criminal procedure cases in relation to all issue areas considered by the Court in any given year (as is generally the case in the literature concerning the liberalism of the Court's outputs, e.g. Casillas, Enns, and Wohlfarth 2010, McGuire and Stimson 2004, Mishler and Sheehan 1993) was made in attempt to distinguish between terms of the Court that are similar in their proportion of criminal procedure cases while being quite different in their net volume of criminal procedure decisions.

Hypothetically, a term in which the Court resolved each of its one hundred cases in a liberal direction may accomplish much more policy liberalism than a term in which the Court decides each of fifty cases in a liberal direction, although each term would be scored as one hundred percent liberal. In terms of the net number of cases, the 1967 term of the Court contained fifty three more decisions on criminal procedure cases than the 1997 term. Yet, the two terms produced the same percentage of criminal procedure cases, 26.9 percent. Only accounting for the proportion of agenda space allocated to issue areas across terms loses a lot of meaningful substantial variation that can be accounted for by the raw count. Criminal procedure issues are one of the four issue areas that dominates the Court's agenda from term to term. Specifically, this issue area routinely constitutes approximately one quarter of all types of cases the Court decides in any given term, however the overall number of cases does differ across terms and provides additional leverage for understanding how the crime rate influence the types of cases the Court selects for review.

Moreover, reducing information about the numbers of cases in a particular direction to a percentage imposes substantive assumptions that the volume of the Supreme Court's workload is fixed over time and exogenously given. However, the Supreme Court's workload has varied substantially

over time during the post-World War II Era and is largely set by the Court itself. Focusing on the volume of cases within an issue area rather than the percentage relaxes these implicit assumptions and allows for a more direct test of theories which involve the decisions of the Supreme Court during the agenda setting stage.

The data on Supreme Court decisions are drawn from the Supreme Court database (Spaeth et al 2017). I rely on its compilers' identification of cases within the scope of criminal procedure issues.¹² The cases that are coded into the database are cases that received a grant of certiorari and were placed on the agenda. While this does limit my analysis to the cases that made it through the certiorari process¹³, there is enough variation in granted cases from term to term to help explain what motivates the Court's attention to different issue areas among terms.

In order to determine if attention to criminal procedure issues is influenced by public opinion, I need a measure of public opinion and perceptions on crime. Here, I rely on a measure that incorporates issue salience with perceptions of the crime and the criminal justice system by using the Policy Agendas Project's dataset of yearly averages of the Gallup "Most Important Problem" index. The index breaks down responses to the question into 23 major topics, including "law and crime." Therefore, I am able to focus only on the annual percentage of respondents who identified crime as the most important problem facing the nation.¹⁴ This number could theoretically range between zero and one, in my sample, the maximum is .32 with a mean of .08. While law and crime does not always claim the top spot on the "Most Important Problem" question (perhaps, unsurprisingly, defense is, on average, the nation's most important issue, followed closely by civil rights and the economy), it is an issue that remains among the top five most important issues and

¹²These are cases which have been coded as "1" according to the Supreme Court Database, indicating that the questions in these cases encompass the rights of persons accused of crime, except for the due process rights of prisoners. Additionally, this issue area captures statutory rules concerning criminal procedure

¹³The Court receives between 6,000 and 8,000 petitions for certiorari every year, and grant fewer than 1 percent of those petitions. By only considering those select few cases that were placed on the agenda, I am not accounting for the full pool of potential cases that the Court could choose between. However, the variation in granted cases can still be used to explain the Court's response to variation in public opinion and changes in economic conditions over time.

¹⁴The "Most Important Problem" averaged yearly summary for law and crime captures the aggregated proportions, on an annual basis, for all of the polls contained in the working data set. These annualized proportions were then constructed by normalizing the percentage of responses in every major topic (e.g. law and crime) by the total percentage of responses in any given year (Jones and Baumgartner, 2017).

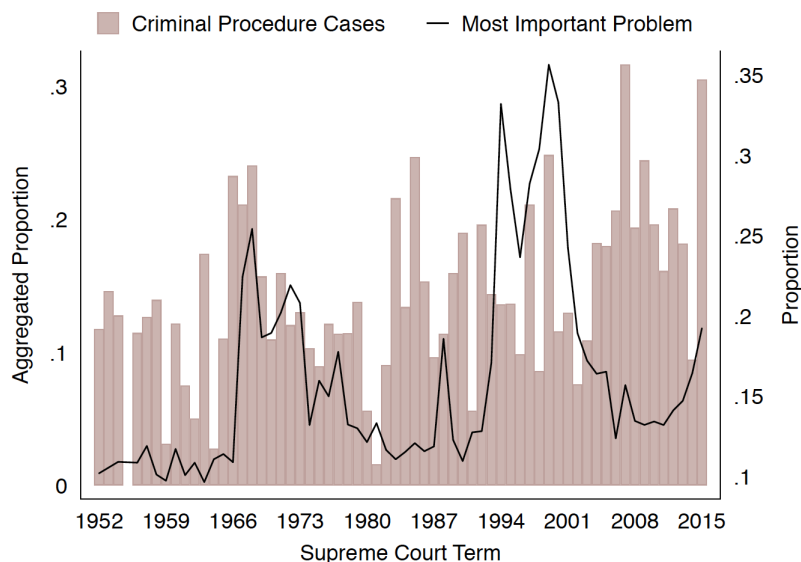


Figure 3.2: Comparing the proportion of respondents who identify law and crime as the “Most Important Problem” facing the nation with the proportion of criminal procedure cases on the Supreme Court agenda.

is consistently mentioned by some percentage of Americans. The variation in salience of law and crime does provide a good opportunity to compare salience with changes in the overall crime rate and congressional attention to crime to determine if public opinion is working with other measures of attention to crime within to influence the composition of the Supreme Court’s agenda over time.¹⁵ Figure 3.2 suggests that there is some relationship between the salience of crime to the public and the Court’s attention to criminal procedure issues.

Additionally, this analysis is interested in exploring a connection between the aggregate crime rate and judicial attention to criminal procedure. In order to determine if the public’s perception of crime is different from the actual crime rate, it is useful to include a measure of reported crimes. Here, I rely on data from the FBI’s Uniform Crime Report (UCR), which contains statistics on violent crime¹⁶ and property crime¹⁷ from law enforcement agencies across the nation. The crime

¹⁵ Additionally, the use of responses to the “Most Important Problem” question allows for a more direct comparison between attention to criminal procedure and economics, which is the focus of another chapter in this dissertation.

¹⁶ Including: murder and nonnegligent manslaughter, rape, robbery, and aggravated assault.

¹⁷ Including: burglary, larceny-theft, and motor vehicle theft

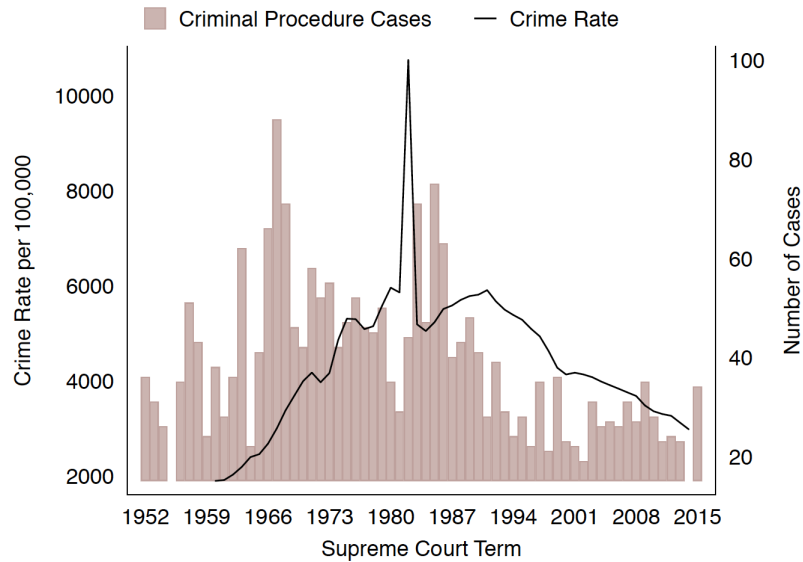


Figure 3.3: Comparing the national crime rate per 100,000 population to the number of criminal procedure cases on the Supreme Court agenda

rate is reported per 100,000 population at the national level. Because I do not have a theoretical expectation regarding a differential effect between violent crime and property crime, I combined the two categories to account for a single crime rate. Figure 3.3 plots the national crime rate against the number of criminal procedure cases on the Supreme Court's agenda. Unlike responses indicating that crime is the most important problem facing the nation, there is not as clear of a relationship between the actual crime rate and judicial attention to criminal procedure. But, there does appear to be a slight delay between an increase in the crime rate and an increase in the number of criminal procedure cases, suggesting that there is a lagged effect of the nationwide crime rate on the Supreme Court's attention to criminal procedure. I test for the presence of a lagged relationship between the variables in models presented below.

Further, because this time period includes a good deal of social and political change, I am interested in whether or not the Supreme Court responds to legislation addressing criminal procedure or the criminal justice system. Therefore, I include a measure of the number of crime bills passed by Congress. These data come from the Congressional Bills Project (Adler and Wilkerson, 2017) and

each bill from 1947-2015 has been classified according to the topic coding system of the Policy Agendas Project to enable systematic comparisons of attention across time. While the Congressional Bills Project contains a wealth of information about the lifecycle of the bill, including the bill's sponsor and how far it advanced through the committee system, I have focused only on those bills which were signed into law. As Figure 3.4 indicates, the Court's agenda is made up of a far greater number of criminal procedure cases than legislation specifically written about crime in any year. However, there is some indication of sustained attention across two branches of government to issues related to crime that suggests there might be a significant relationship between crime laws and judicial attention to criminal procedure.

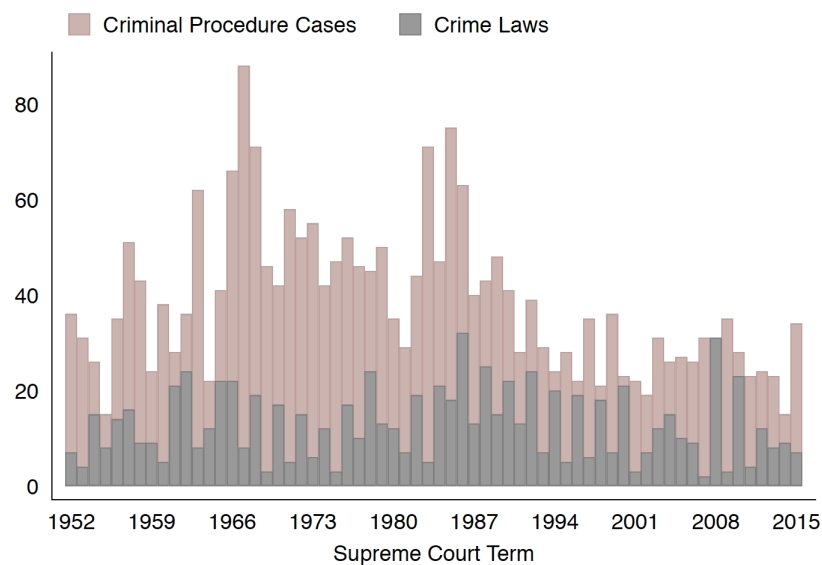


Figure 3.4: Comparing the number of crime-related bills passed by Congress to the number of criminal procedure cases on the Supreme Court agenda

Finally, I control for the ideological preferences of the justices and whether or not the sitting president is a Republican. In order to capture dynamics in ideology, I use the Martin-Quinn score for the Court median in any term (Martin and Quinn, 2002). Because Martin-Quinn scores evolve over time, they are useful for capturing changes in issue attention. More positive values indicate

a more conservative median, and more liberal values indicate a more liberal median. Starting with Richard Nixon in 1968, Republican presidents took a tough “law and order” position that focused on “street crime” and then the war on drugs in the 1980s and early 1990s. Controlling for a Republican president is another way to help determine the re

Because criminal procedure is an area in which there has been a lot of change in the application of doctrine between the leadership of the Supreme Court, I expect my standard errors to be clustered according to the Chief Justice. I therefore estimate the model with clustered standard errors (Chief Justices Warren, Burger, Rehnquist, and Roberts). Finally, to account for the lagged effect of the crime rate, systemic attention to crime, and institutional attention to crime, I specify my model with three lags.¹⁸

3.5 Results

Recall that my dependent variable is the number of criminal procedure cases on the Supreme Court’s agenda. This is a count variable with a lower bound of zero, and in the absence of strong autocorrelation or overdispersion, this type of “event count” data is typically modeled with a Poisson regression model (Brandt et al., 2000). Additionally, because I am interested in explaining the components of judicial decision-making in criminal procedure that are due to the crime rate and the components that are due to something else, I do not include a lagged dependent variable. By not lagging the dependent variable, I am able to eliminate as much of the effects of the reported crime rate from both the public’s evaluations and justices interpretation of the perceptions on crime as possible. In other words, I am able to focus on the perceptions of crime, as the crime rate, while useful for understanding legislative allocations to the criminal justice system, matters inasmuch as perceptions of law and crime influence interactions of the mass public with the law and crime. In other words, perceptions carry more weight in terms of public evaluations, which in turn influences salience of law and crime as an issue. The results of the above model are presented in Table 3.1.

¹⁸The selection of lag length used in this analysis was determined by examining different selection criteria including AIC, HQIC, and SBIC. The selection criteria produced mixed results. HQIC and SBIC agree on a lag selection of one, where FPE and AIC agree on a lag selection of three. Because of my smaller sample, I elected to adopt the suggestion of FPE and AIC.

	Contemporaneous Effect	One Year Lag	Two Year Lag	Three Year Lag
Crime Salience	1.852* (1.34)	-0.737** (0.288)	-0.967 (0.604)	0.079 (0.307)
Crime Rate	-0.00001 (0.00002)	0.00004** (0.00002)	-0.00003** (0.000001)	0.0000004 (0.00001)
Crime Laws	0.012* (0.006)	0.025** (0.009)	-0.003 (0.006)	-0.009 (0.006)
Court Ideology	0.253 (0.216)			
Rep. President	0.276** (0.088)			
Warren Court	0.958** (0.288)			
Burger Court	0.410** (0.079)			
Rehnquist Court	-0.061 (0.113)			
Constant	2.782* (0.294)			
Log-Likelihood	-177.28			
AIC	7.55			
Observations	52			

Table 3.1: Poisson Regression Model of the Number of Criminal Procedure Cases on the Supreme Court Agenda, 1960-2015. * = $p\text{-value} \leq 0.10$ ** = $p\text{-value} \leq 0.05$; one-tailed tests. Clustered standard errors in parentheses.

When accounting for the temporal dynamics in the data, some interesting patterns emerge. Not only are public perceptions of law and crime a statistically significant predictor of judicial attention to criminal procedure cases, but so is the overall crime rate and the number of crime laws passed by Congress. However, the significance of these effects emerge at different lags, suggesting that the Court's attention to criminal procedure is driven by different combinations of measures of crime.

First, consider the public's perceptions regarding law and crime as a salient issue facing the country. The largest effect between judicial attention to criminal procedure and public attention to law and crime is in the contemporaneous period. Here, when the public increases their belief that law and crime is the most important issue facing the country relative to other issues, the Court responds by placing more criminal procedure cases on the agenda. However, the negative and statistically significant effect with a one year lag suggests that understanding the number of criminal procedure cases on the agenda is better explained by the public's attention to other issues,

as well as other factors, such as the crime rate and legislation focused on crime. The public's evaluations of crime as the most important issue becomes positive, but not statistically significant, at the three year lag as well. This oscillation between a positive and negative value indicates that there are periods where the Court is more driven by public attention to crime, and periods where attention to criminal procedure is motivated by factors separate from public issue attention. The presence of any statistically significant effect is consistent with my expectation that the systemic agenda does influence the Court's institutional agenda. This finding is consistent with previous scholarship demonstrating that the Supreme Court is responsive to public opinion at the merits stage (e.g., Casillas, Enns and Wohlfarth, 2011; Giles, Blackston and Vining, 2008; McGuire and Stimson, 2004), and the impact of an increase in issue salience on the probability of justices granting certiorari (Bryan, 2014) has shown the impact of issue salience on the probability of justices granting certiorari. Further, because criminal procedure is an issue area that constitutes a sizeable portion of the Court's agenda from term to term, this result demonstrates the importance of considering issues over cases in explaining judicial preferences, particularly in an area in which the Court has substantially revised doctrine over time.

Turning to the crime rate, there is oscillation between a positive effect and negative effect across different lags, suggesting again that the Court's attention to criminal procedure is sometimes driven by a change in the crime rate, and at other times structured by other factors. It is interesting that the statistically significant effects manifest at the one year lag and two year lag, which might help account for the natural delay in cases reaching the Supreme Court once the litigation has been initiated in lower courts. Further, an increase in the crime rate from the previous year is going to motivate the justices to accept more criminal procedure cases for review, but an increase two years prior is going to result in less attention given to criminal procedure cases. Considering the lack of a statistically significant effect on the number of criminal procedure cases from issue salience at the two year lag, it might be that the Court's attention to cases within this issue area are better explained by more recent changes than changes at longer lags.

The number of laws passed by Congress that deal with crime positively and significantly pre-

dict judicial issue attention to criminal procedure cases at two time periods: contemporaneously and at a one year lag. This indicates the the Court is attentive to the business of Congress within this issue area and responds by allocating more of their agenda space to criminal procedure when there is an increase in legislation on law and crime. Again, there is a switch in the direction of the signs for this variable from positive at shorter lags to negative at longer lags. The positive and statistically significant effect of law and crime legislation suggests that the Court is more responsive to congressional behavior within this issue area more immediately. This finding supports my expectation that the Court would structure their agenda in the area of criminal procedure in an effort to engage in a policymaking dialogue with an elected branch of government.

Unsurprisingly, a Republican president has a positive and statistically significant effect on the number of criminal procedure cases on the Supreme Court's agenda. With the Republican party advocating for tougher laws governing criminal procedure during most of the time covered in this analysis, it makes sense that the Court would engage in the policymaking debate, whether it be advancing protections afforded to criminal defendants under the due process clause during the Warren Court, or focusing more on constitutionalizing the control of crime during the Burger Court. However, ideology is not a significant predictor of attention to criminal procedure cases. This result indicates that Smith's (2002) assertion that constitutional criminal procedure best understood as interest-balancing has some empirical support because the variables that significantly predict attention to criminal procedure cases can best be explained as different ways to balance and represent interests of affected parties.

3.6 Conclusions

The macro-dynamics of issue attention are an important aspect of agenda setting in American politics because they reveal the competing influences which structure variation in issue attention. This research contributes to and expands the literature on agenda setting by considering the differential effects of public opinion and institutional preferences of the other branches of government on the United States Supreme Court. The Court has often been overlooked in studies of agenda setting because the justices are unelected and not accountable to any constituents. However, overlooking

the Supreme Court limits our ability to more completely explain attention dynamics in American politics, as the Court routinely hears and decides cases and controversies which implicate a variety of issues salient to the public and addressed by the executive and legislature.

While this article focuses on a single issue area, criminal procedure, these findings still provide a general understanding of why institutional issue attention is dynamic. Further, criminal procedure is an area in which the Court has continuously revised doctrine in ways that both support and go against the preferences of other actors in the political system. Here, I find support for the effects of public opinion and cross-institutional attention to law and crime on the number of criminal procedure cases reviewed by the Supreme Court. Additionally, these results speak to the importance of considering issue-specific preferences and attention when explaining variation in Supreme Court issue attention rather than only considering aggregate public mood (the preference for more liberalism or conservatism in government policy) or the total amount of legislation passed in a single year. While the aggregate information is useful for explaining broader trends, only focusing on the more general measures assumes that preferences are uniformly distributed across issue areas. By focusing on issue-specific measures, we are able to get a more comprehensive understanding of the sources of variation in issue attention at a more granular level over time.

The results presented here highlight the importance of both public attention and institutional attention to agenda setting for specific issues. Because the Court is linked to the president through the Justice Department, solicitor general, and selection of justices; and linked to Congress through judicial review and the Senate's approval of judicial appointments, more attention needs to be paid to attention interdependence. Additionally, future research would benefit from examining these issue-specific preferences across multiple issue areas, as well as examining the trade-off relationships that structure issue attention in order to really determine the macrodynamics of agenda setting in American politics.

4. PIECING IT ALL TOGETHER: UNDERSTANDING DYNAMIC ISSUE ATTENTION ON THE U.S. SUPREME COURT

4.1 Introduction

“The definition of alternatives is the supreme instrument of power” (Schattschneider, 1960, p.68). “Agendas foreshadow outcomes: the shape of an agenda influences the choices made from it” (Riker, 1993). Both of these declarations point to the importance of agendas in politics, as well as the ability to draw attention to particular problems or issues through the specification of alternatives. Since political attention to issues is limited by a law of scarcity, attentiveness to one problem is often derived at the expense of ignoring others. Therefore, the economy of attention is at the center of problem identification and agenda setting processes more generally (see Baumgartner and Jones, 1993).

Throughout history, the United States Supreme Court has served as a major player in shaping the character and direction of public policy through the decisions it hands down. The issues that have garnered the Court’s attention have also changed over time, suggesting that the type of cases that receive certiorari fluctuate according to judicial preferences. While a great deal of attention has been paid to which cases are selected for review and what makes a case “cert-worthy”(i.e., Black and Owens, 2009; Caldeira and Wright, 1988’ Caldeira, Wright and Zorn, 1999; Collins, 2008; Hall and Ura, 2015; Hammond, Bonneau and Sheehan, 2005; Harvey and Friedman, 2009; McGuire 1995; McGuire and Caldeira, 1993; Perry, 1991; Sheehan, Mishler and Songer, 1992; Songer and Sheehan, 1993; Tanenhaus et al., 1963; Ulmer, 1978, 1984), less attention has been given to the underlying issues that capture the Court’s attention. In other words, most research has focused on the micro-level approach to certiorari, in which the cases themselves matter, with less attention given to a more macro-level approach in which it is the issue, not a specific case. McGuire and Palmer (1995, 1995), in their examination of issue fluidity on the Supreme Court, lay the foundation for understanding the importance of the issues the Court chooses to address in

specific cases.

Issues are a central feature in most political systems. For it is around issues that politicians attempt to create policy, and either claim credit for the successful implementation of policy in a particular area or attribute blame to the other side when policy is not as successful. As the theory of issue ownership (e.g., Petrocik, 1996) articulates, political parties hold reputations for their ability to handle certain issues, and those reputations provide candidates with credibility over issues associated with their party. And while scholars of judicial politics have recognized that Supreme Court justices do express their preferences at different stages in the decision-making process (e.g., Black and Owens, 2009; Epstein, Segal and Victor, 2002; Hammond, Bonneau and Sheehan, 2005; Perry, 1991; Segal and Spaeth, 2002; Ulmer, 1984), less attention has been paid to why trade-offs between issue areas that shape the Court's agenda reflect the priorities of the current justices and what that means for how we understand and explain Supreme Court agenda-setting.

Understanding political attention to an agenda requires understanding attention diversity, the degree to which attention on an agenda is distributed across all items, from complete concentration (a single item receiving all attention) to complete diversity (all items receiving an equal level of attention) (Boydston, Bevan and Thomas, 2014). Past work on attention diversity suggests that diversity of attention across policy issues on a given institutional agenda can affect, among other things, how the agenda changes over time (e.g., Baumgartner and Jones, 1993). Attention diversity is important because, as in the case of most agendas, each bit of attention paid to an issue is one bit less attention paid to everything else; that is, agenda-setting is a zero-sum game (Zhu, 1992). However, Lipsmeyer, Philips and Whitten (2017) contend that attention diversity in political budgeting is an expression of the relative importance of policy priorities, suggesting that agenda-setting does not always have to be a zero-sum game. From the perspective of Supreme Court agenda-setting, the Court may desire to alter the composition of their agenda to fit their ideological or partisan priorities; however, their ability to do this may be constrained by the preferences and priorities of the other branches of government. Understanding how the Court allocates attention diversity to groups of cases across issue areas is a more holistic approach to explaining judicial

behavior.

I develop expectations regarding agenda diversity as predictions about the Supreme Court's dynamic attention to issues related to the economy, criminal procedure, civil rights and liberties, and judicial power. First, I expect that the structure of the Court's agenda is influenced by trade-off relationships, where an increase in issue attention to one area indicates that there will be a decrease in attention to another issue area. Second, my theory predicts that issue attention is influenced by the partisan composition of the bench. The Supreme Court's issue attention should shift toward policy domains over which Republicans exert greater issue ownership as the membership of the Court becomes more conservative, and, conversely, the Court should pay greater attention to policy domains over which Democrats have stronger issue ownership as the Court becomes more liberal. Specifically, I expect that a bench with more Republican-appointed justices will allocate more attention to criminal procedure and economic cases, and less attention to civil rights cases. Finally, I expect that partisan priorities and preferences will better predict issue attention because justices, like other political elites, care about the overall reputation of their party and seek to resolve cases that implicate the issues their party works through in the other branches of government.

I evaluate these expectations by examining the Supreme Court's attention to four issue areas from 1951 to 2011. I estimate a statistical model of the number of Supreme Court cases related to the economy or labor unions, criminal procedure, civil rights and liberties, and judicial power according to the Supreme Court Database in each term as a function of the expressed ideology of the Court's justices, the party in control of the White House and both chambers of Congress, and the party of the appointing president. I estimate two separate models, one with the partisanship variables and one with the ideology variables in order to determine whether issue attention is better explained by partisanship or ideology. The data do not provide significant support for some of my theoretical expectations, but still indicate interesting dynamics within Supreme Court agenda setting. While I expected an increase in the number of Republican-appointed justices to result in more attention given to economic and criminal procedure issues, the data indicate that attention to economic issues remains largely unaffected. Further, there is a long-run decrease in attention

to criminal procedure cases, accompanied by an increase in attention to both civil rights and judicial power cases. Regardless of accounting for partisanship or ideology, there are more observed changes in attention to judicial power cases than within the other issue areas.

These results indicate that issue attention by the U.S. Supreme Court is not merely the result of the incidental aggregation of the policy domains in which individual cases are situated. The Court's attention across issue areas is systematically associated with macro-political dynamics in the ideological and partisan orientations of the Court's members and the ideological and partisan control in the other two branches of government. These results provide a more complete picture of the relationship between the U.S. Supreme Court and the broader dynamics of the American political system. They also provide further evidence of ordinary political motives at play along with legal factors in the behavior of Supreme Court justices. And these results indicate that the dynamics of agenda-setting are best explained as trade-offs between issue areas.

4.2 A Brief Overview of the Certiorari Process

Among the most important decisions that the Court makes in any case is whether to take it in the first place. The decision of whether or not to grant certiorari is an important early step in the decision-making process that has been focused on by most scholars of the Court: the decision on the merits. At the certiorari stage, the justices themselves are choosing which cases to hear. The justices have no obligation to disclose why they selected one case over another, nor indicate how their future vote on the merits. That the justices themselves have the ability to choose which cases they do and do not hear has not been lost on either members of the Court nor on scholars of law and courts. Justice Brennan referred to their ability to set the agenda as "second to none in importance," and Justice Marshall stated that the power to not decide a case is "among the most important things done by the Supreme Court" (Brennan, 1972; Marshall and Tushnet, 2001).

Despite Supreme Court justices and scholars agreeing that one of the most important decisions that the Court makes is whether or not to accept a case for review, the ability of Supreme Court justices to have discretion over their case selection is still a relatively new phenomena. Through a number of bills passed over the years, Congress has altered the Supreme Court's jurisdiction,

changing the Court from one which was largely required to hear most of cases appealed from lower courts (via mandatory jurisdiction) to one that could set its own agenda (via discretionary jurisdiction). When Congress passed the Judiciary Act of 1891, it began to ease the Court's workload burden by, first, creating the United States Courts of Appeals to hear all cases appealed from federal district courts and, second, carving out a small discretionary docket for the Supreme Court. The Judiciary Act of 1925 (also known as the Judges' Bill) further removed much of the Court's remaining mandatory jurisdiction, leaving justices with even more power to set their own agenda. Because of the Judges' Bill, a formal request to review the decision of the lower court must come through a petition for a writ of certiorari. The justices themselves then choose among the petitions which to grant and which to deny. Finally, in 1988, Congress paved the way to granting the Court almost complete control over their docket when it passed legislation that removed virtually all the Court's mandatory jurisdiction. Accordingly, today's justices can choose the cases they wish to hear, with little to no direction as to the types—or numbers—of cases before the Court (see Owens and Simon, 2012). Rule 10, part of the rules that govern behavior and procedure on the Supreme Court, is entitled "Considerations Governing Review on a Writ of Certiorari." The very name of the rule indicates that there is little to no formal guidance on agenda setting. Further, the language of the rule speaks to justices deciding "questions" not "cases." That the rule specifically mentions questions is important for understanding the issues that come to the Court's agenda. In other words, cases "simply provide the framework in which issues are addressed" (McGuire and Palmer, 1995, p.692).

Most research examining what processes bring cases before the Supreme Court focus on a micro-level approach. Under this approach, the emphasis is on individual cases and fluctuation in justices votes on the merits, where strategy plays out on a case-by-case basis. In other words, the micro-level approach considers that each case has a latent degree of certworthiness that becomes evident to the justices through a variety of different factors. The most prominent examination of the certiorari process in general remains Perry (1991), which leverages numerous interviews with justices and their law clerks to provide an in-depth, qualitative look at this rather secretive

process.

Other scholars have adopted a more quantitative approach, and focused on more narrow questions pertaining to specific aspects of the certiorari process over time. In an attempt to explain how case-specific factors influence the decision to grant certiorari, scholars have examined the role of jurisprudence in accepting cases for review (e.g., Black and Owens, 2009; Caldeira and Wright, 1988; McGuire and Caldeira, 1993). Beim and Rader (2018); Caldeira, Wright and Zorn (1999); Epstein, Martin and Segal (2012); and Ulmer (1983, 1984) all find that the Court is more likely to take a case when there is a disagreement between lower courts, or when lower courts deviate from clear Supreme Court precedent. Additionally, scholars have considered whether certiorari votes are affected by the anticipated vote on the merits in determining whether or not to grant review to a petition (Benesh, Brenner and Spaeth, 2002; Boucher and Segal, 1995; Caldeira, Wright and Zorn, 1999; Palmer, 1982). Similarly, Palmer (1990) demonstrates that the justices are more likely to grant petitions in cases where they will vote to reverse the lower court. However, other scholars have demonstrated that the Court is more likely to grant certiorari in attempts to induce compliance within the judicial hierarchy (Boucher and Segal, 1995; Caldeira and Wright, 1988; Caldeira, Wright and Zorn, 1999; Cameron, Segal and Songer, 2000). Other scholars have examined certiorari from a separation of powers framework, and looked at the extent to which Congress attempts to influence the Court's decision to grant certiorari (Harvey and Friedman, 2009; Owens, 2010). These studies have allowed for a more comprehensive examination of which cases are selected for review. However, focusing on the micro-level processes has led to a lack of understanding about the importance of issue area in the agenda-setting process, and why the issue perspective is important.

4.3 Issue Ownership and Agenda Setting on the Supreme Court

Understanding the ideological composition of the Court and how that influences the types of issues they are likely to resolve speaks to a classic problem in political science: issue attention. The theory of issue ownership (Damore, 2004; Petrocik, 1991, 1996; Petrocik, Benoit and Hansen, 2004) has been used to assess how presidential candidates define and control campaign agendas.

Briefly, this theory posits that the parties hold reputations for their ability to handle certain issues. These reputations, in turn, provide candidates with credibility over issues associated with their party. And, by discussing those issues dominated by their parties, candidates are able to signal to voters that they will continue their party's ability to solve problems in the issue area. For example, Democrats are seen to have ownership over social welfare, whereas Republicans are traditionally assumed to have ownership over foreign policy and the economy.

As the work of Petrocik, Benoit and Hansen (2004) and others suggests, macro-level forces (e.g., the state of the economy) shape the context in which campaigns occur. Because these macro-level forces are constantly changing, candidates' selection or avoidance of specific issues may be shaped by the current political context. As Stimson, MacKuen and Erickson (1995) demonstrate, because politicians are informed about movements in the nation's ideological tenor, successful candidates are apt to adapt their behavior in response to changes in the public's mood, or policy preferences. Applying this principal to the Court, Casillas, Enns and Wohlfarth (2011); Durr, Martin and Wohlbrecht (2000); McGuire and Stimson (2004); and Mishler and Sheehan (1993) demonstrate that the Court responds to public opinion and changes in mood in ways that are not dissimilar from the elected branches of government. This suggests that context matters for which issues the Court will choose to review, especially when evaluated in conjunction with the composition of the Court.

The justices themselves have acknowledged that they see the Supreme Court as a place to resolve significant issues of federal law, not for deciding individual, and frequently interchangeable, cases: "To say that cases are fungible is not to suggest that an individual case is of no importance, or that differences between cases do not matter . . . Nevertheless, it is the issue, not the case that is primary" (Perry, 1991; p.221). The discretion to grant or deny certiorari to a case is tied up in the issue presented by the case, as well as whether or not the justices decide whether the time is right to hear a given case. Speaking about defensive denials, Justice Sotomayor stated that "And so what people think of as defensive denials sometimes are just judgements about what's the best set of facts to bring this up on . . . and have a full discussion about the legal issue" (Sotomayor and

Greenhouse, 2014, p.383). In line with what the justices admit, scholars have demonstrated that attention to issue domain[s] presented by a case, or set of cases, provides a better understanding of when certiorari petitions are granted than by focusing on the specific questions addressed in individual cases (e.g., Beim, Clark and Patty, 2017; McGuire and Palmer, 1995, 1996; Perry, 1991).

Accepting that the Court is focused more on issues than cases when setting their agenda suggests the importance of viewing agenda setting as a continuous process, one that starts, but does not end, with the decision to grant or deny certiorari. However, certiorari is an important first step because here the justices narrow the range of issues to which they will devote their attention and resources. Even though the vast majority of petitions for certiorari are denied, the cases the Court selects for review do not all fall within the same issue dimension. In other words, there is variation in issue attention each term. The larger patterns of issue attention over time suggest that certain issue areas are likely to be more successful than others at different points in time. For example, since the 1930s, the justices have gradually shifted their attention away from economic questions and toward developing case law in the civil liberties domain. As Pacelle (1991) explains, this ebb and flow of the Court's policy priorities can be understood, to some extent, as a function of the changing preferences of the justices themselves. In other words, at the macro level of aggregation, the fluidity of the Court's agenda manifests itself as attention given between and within policy domains as the preferences of the sitting justices change (e.g., Misher and Sheehan, 1993).

Part of the change in preferences may also be attributed to changes in the composition of the Court, or the introduction of new members, which alters the ideological tenor of the Court. While new appointees may share some of the same ideological predispositions as the justice they replaced, sometimes a new member of the Court can drastically shift the ideological balance. Scholars interested in explaining a separate, but related, component of judicial decision-making have looked at why the composition of the Court matters for opinion content. Carrubba et al. (2012) articulate a model of judicial decision-making in which the median justice in the majority coalition is the pivotal player during opinion writing in shaping the content of the Court's majority

opinion. They note that new appointments to the Court, even if they do not change the overall median member of the Court, can shift the ideological composition of majority coalitions, and the location of coalition medians, subsequently resulting in dramatic consequences for the content of opinions. This extends to agenda-setting because a new appointee will either increase, decrease, or retain the status quo proportions of attention to different issue areas.

How and why does this matter for the Supreme Court? Despite the overarching view of the Court as a legalistic, relatively nonpartisan institution, the public also perceives it to be political. For example, Scheb and Lyons (2000) find that over two-thirds of the public perceived that ideological or partisan influences had some effect on Supreme Court decisions. Similarly, Hetherington and Smith (2007) demonstrate that perceptions of the Court's ideological composition also shape support among partisan identifiers. Stated differently, the public believes that the Court is not entirely apolitical, and that both legal factors and ideology influence the types of cases selected for review and the context of the decision on the merits.

However, most studies of the Supreme Court make use of ideology rather than partisanship to explain agenda-setting, decisions on the merits, and public acceptance of Supreme Court decisions. For example, Black and Owens (2009) make use of the Martin and Quinn (2002) scores to predict the policy location of the Court's merits decision in order to leverage whether or not the Court's ideological preference for agenda-setting is influenced by law or policy goals. Further, most models of Supreme Court decision making build upon one key assumption articulated by Martin and Quinn (2002, p.138): "each justice's vote is an expressive action and depends only on the value the justice attaches to the policy positions of the status quo and the policy alternative. Put another way, a justice will vote to affirm the decision of the lower court if the utility the justice attaches to the status quo is greater than the utility the justice attaches to the alternative, regardless of the expected actions of the other actors. That is not to say that partisanship and the Supreme Court have never been considered together (see Gibson, Caldeira and Spence, 2003; Ramirez, 2008), but these studies focus more on whether political perceptions of the Supreme Court harm its institutional legitimacy. A few studies do test for whether partisan divisions on the Court influence

the public's acceptance of their decisions (e.g., Gibson, Caldeira and Spence, 2005; Zink, Spriggs and Scott, 2009), but these studies are not testing for a partisan outcome, but examining a partisan process with general and vague language, therefore not really connecting partisanship or partisan connections to issues with public evaluations of the Supreme Court.

4.4 A Partisan Theory of Supreme Court Decision-Making

Judicial review is an area where partisan explanations for judicial behavior has been leveraged. Because justices are nominated and confirmed by partisan officials, they might use their authority to promote the interests of their own partisan coalition, perhaps by striking down objectionable statutes leftover from a previous partisan order, recently adopted by a new governing coalition, or enacted by the justices' partisan opponents during a period of divided government (see Keck, 2007). Additionally, Epstein and Posner (2016) argue that justices feel some degree of loyalty for their appointing president, and are significantly more likely to vote for their president (when the government is a party to a case) than other presidents during their tenure on the bench.

Despite these connections to partisanship, scholars of Supreme Court decision-making have not examined how partisanship influences agenda-setting and decision-making, choosing instead to rely on ideological preferences. True, there is a well-established relationship between partisanship and ideology (e.g., Bartels, 2000; Campbell et al., 1960; Converse, 1964; Jacoby, 2010) Campbell et al. (1960); Bartels (2000); Converse (1964); Jacoby (2010), but partisanship and ideology are separable. And partisanship is often used to determine issue ownership. In other words, a candidate running for office as a Republican is more likely to stress issues pertaining to foreign relations and the economy, whereas a Democratic candidate is more likely to focus on social welfare issues. As scholars have repeatedly demonstrated, Supreme Court justices have preferences over policy (e.g., Black and Owens, 2009; Epstein, Segal and Johnson, 1996; Segal and Spaeth, 2002), but why should those preferences be limited to ideological considerations? The issue ownership literature provides an interesting framework for understanding why there is variation in issue attention on the Court over time, especially when considering the relationship between issue attention, public preferences, and the partisan and ideological similarities or differences between the Court and the

other branches of government.

Adopting a partisan framework for unpacking variation in issue attention on the Court over time lends itself well to an economic or interest-group theory of government, as articulated by Palmer (1982). Here, legislatures, executives, and courts are perceived as producers and sellers of governmental protection. In particular, the Supreme Court operates as a “producer” of government protection by producing changes in the law. These changes, which either solidify or alter the status quo, are achieved by accepting and rejecting selected decisions of the lower courts. Further, this assumes that all the Court’s actions will affect the law to some degree. Discretionary jurisdiction is an essential feature to this framework because it allows the Court to decide how and when they will produce changes in the law based on the cases it chooses to review. In line with the extensive literature on the importance of discretionary jurisdiction for understanding agenda setting on the Supreme Court, it is possible that the macro-level approach of focusing on issue areas rather than on individual cases is just noise. Or, that in setting their agenda, the Court is focusing on the cert-worthiness of each individual case

Along with discretion, issue fluidity (McGuire and Palmer, 1995, 1996) allows for a better understanding of the connection between partisan issue ownership and Supreme Court decision-making. Issue fluidity speaks to the ability of judges to transform the issues in the cases they decide because of the malleability inherent in questions of law. The questions resolved at trial level are often not those that are addressed on appeal. Since the 1930s, justices have gradually shifted attention away from economic questions and toward developing doctrines in civil liberties. Thus, variation in issue attention is a combination of the changing preferences of the sitting justices, and political context in which they operate. In other words, the composition of the Court influences which issues are addressed in combination with the preferences of both the public and other branches of government. Or, the cases to which the Court gives their attention is motivated by both political and ideological preferences.

Building on the extensive literature evaluating the impact of ideology on judicial decision making, the next step is to explain how Supreme Court agenda-setting from a different angle: issue area

trade-offs. This involves moving from theorizing about and evaluating the ideological direction of the Court's decision in an issue area to considering how the Court allocates their resources among the various issue areas and policy domains. When thinking of how the Court sets their agenda, it is useful to consider how the composition of the Court reflects trade-offs between issue areas. However, to my knowledge, there is no current research on Supreme Court agenda-setting which examines trade-offs among issue areas. There is an extensive scholarship which examines both policy content of and policy output from Supreme Court decisions in different issue areas (e.g., Black and Owens, 2009; Caldeira, Wright and Zorn, 1999; Epstein and Knight, 1998; Hammond Bonneau and Sheehan, 2005; McGuire et al., 2009; Segal and Spaeth, 2002), but these studies typically have issue areas expressed as a percentage of the whole. When thinking about the Court's agenda-setting decisions more holistically, the effect of partisan and ideological preferences shifts from affecting one issue area compared to all other areas and instead, reflects trade-offs between issue areas – a more realistic picture of agenda-setting.

In addition to considering Supreme Court agenda-setting as trade-offs between issue area, agenda-setting does not occur in an ideological or political vacuum; issue attention may affect how the composition of the Court influence its behavior on issue area trade-offs, and understanding the variation in issue attention over time. Most of the work on the level of attention to single issues has driven much of what we know about politics, from looking at the range of political conflict (Schattschneider, 1960), to understanding gridlock in Congress (Binder, 2005; Richardson and Jordan, 1979), to punctuated equilibrium (Baumgartner and Jones, 1993; Jones and Baumgartner, 2005). However, as Boydstun, Bevan and Thomas (2014) point out, the mechanisms that drive attention to a single issue often overlooks the underlying lesson: “since agenda space is finite, attention to one issue affects not just that issue, but all other issues and the agenda as a whole” (p. 173). In other words, examining the level of diversity in issue attention over time provides for a better understanding of why government as whole pays attention to the issues it does.

Viewing Supreme Court agenda-setting from a compositional or ‘trade-off’ perspective significantly alters how to approach the relationships between ideology, partisanship, and agenda-setting.

The Court may desire to alter the composition of their agenda to fit their ideological or partisan priorities; however, their ability to do this may be constrained by the preferences and priorities of the other branches of government. Bringing together previous research on agenda-setting and issue ownership, I theorize that the way in which ideological and partisan preferences shape the composition of the Supreme Court's agenda will depend on the composition of the Court. Extending Lipsmeyer, Philips, and Whitten's (2017) approach to the composition of budgets as influenced by ideological considerations as an expression of the relative importance of policy priorities, I expect that Court's with more proportions of justices appointed by Republican presidents will react differently to the ideological and partisan composition of the other two branches of government and alter the composition of their agenda in response: specifically by allocating more attention and space on the agenda to cases within the economic issue area, and less attention and space to civil rights cases. Increased attention to economic areas is attributed to periods with a higher proportion of Republican-appointed justices following Petrocik's (1996) findings that voters perceive government spending, inflation, taxation, and other economic issues to be the province of the Republican party, whereas handling social welfare issues, or issues related to groups in society, is viewed as an asset of the Democratic party. Additionally, Republicans "own" crime (Petrocik, 1996), so I expect that Court's with higher proportions of Republican-appointed justices will accept more criminal procedure cases for review.

Figure 4.1 demonstrates the variation in attention among the four main issue areas over time, along with periods where a Republican president appointed a new justice to the bench. While this figure is useful for visually understanding shifts in judicial issue attention, and suggests that there are trade-offs among issue areas that occur when the Court shifts their attention from one issue area to another. However, it is not clear from an examination of these four issues individually where the trade-offs occur.

If the justices care about the political impact of their decisions, then they will structure their agenda in such a way to advance their policy preferences once a case reaches the merits stage. In other words, in order to enter into the conversation about economic policy, the justices need to take

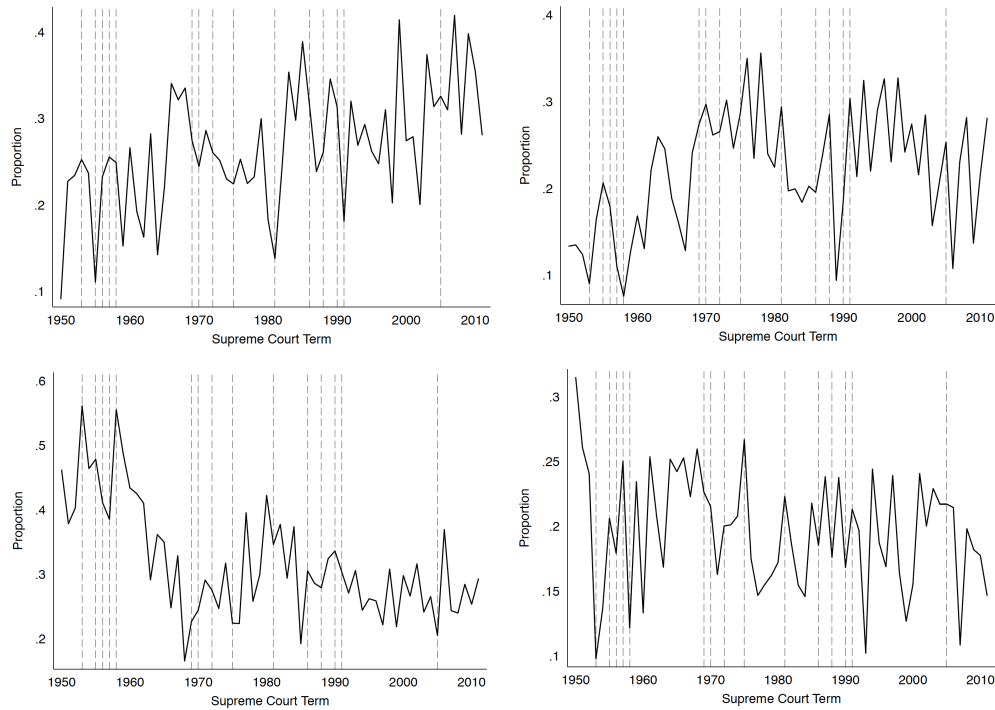


Figure 4.1: The proportion of cases on the Supreme Court's agenda in the four issue areas. The top left panel and top right panel indicate the proportion of criminal procedure cases and civil rights cases, respectively. The bottom left and bottom right panels indicate the proportion of economic cases and judicial power cases, respectively. The vertical gray lines indicate when a Republican president appointed a new justice.

cases that allow them to pass judgment on the economy.¹ By selecting cases that enable them to advance their preferences at the merits stage, the justices effectively express their preferences at an earlier stage in the decision making process. This then speaks to the importance of considering the decision to grant certiorari and the decision on the merits as a set of nested process, as well as the importance of understanding both ideological and partisan motivations. Taken together, this perspective allows for the expression of preferences at multiple stages in the decision making process as a result of the trade-offs made between issue areas.

¹The same logic extends to the other issue areas. If the Court wishes to weigh in on the direction of social policy, crime, or engage in judicial review, they will need to take more cases concerning civil rights and liberties, criminal procedure, and judicial power, respectively.

4.5 Data and Methods

In order to test my theoretical claim that variation in issue attention on the Supreme Court is a reflection of the justices' partisan preferences, I gathered data on the cases that received certiorari during the 1951 to 2011 terms. This seventy year time period enables me to examine the impact of different groupings of justices on the trade-offs between issue areas over time. According to the theory that the Supreme Court is a reactive institution in that it depends on outside actors for the comprehensiveness of its agenda (see Baird and Jacobi, 2009), an ideal measure of the comprehensiveness of the Court's agenda would be to develop a list of all the possible issues the Court could hear and then determine the ratio of issues heard to issues that are not heard. Since there is no bound on all potential issues at any time, a count of the number of issues on the agenda in a particular policy area at any one time is a close approximation. While this is not an unreasonable modeling choice, focusing only on the number of issues on the agenda ignores important nuances in understanding the allocation of judicial attention to groups of issues over time.

As I am explaining issue area trade-offs on the Court's agenda, my dependent variable is the proportion of the agenda allocated to an issue area. I used data from the Supreme Court Database (Spaeth et al., 2017) and relied on their classification of the fourteen issue areas in which cases are organized. However, because of the prevalence of zeros in several issue areas, I focused on the four largest categories: Criminal Procedure, Civil Rights and Liberties, Economic, and Judicial Power.²³ The dependent variable is thus a compositional variable which I label y_{itj} to represent the proportion of the agenda for the Court at time t that is allocated to issue area j . As such, in any Court term, $0 < y_{itj} < 1$ and $\sum y_{itj} = 1$.

Why use a compositional dependent variable? An assumption underlying a good amount of research on judicial agenda-setting is that the cases the justices select for review reflect the policy

²While the reduction of the fourteen issue categories into only four may raise concerns regarding the loss of overall variation and subtle nuances between other issue areas that the compositional dependent variable approach is capturing, I have reason to expect that trade-offs between issue areas are more likely to occur between the four areas to which the Court pays the most consistent attention. Further, the use of a reduced number of issue areas is not uncommon in the judicial politics literature (e.g., McGuire and Stimson, 2004).

³The cases considered economic issues include economic activity, unions, and federal taxation. These issue areas are coded as 7 "unions," 8 "economic activity," and 12 "federal taxation" according to the Supreme Court database.

preferences of the members of the Supreme Court (e.g., Black and Owens, 2009; Caldeira and Wright, 1988; Epstein, Segal and Johnson, 1996; Segal and Spaeth, 2002). I also see a parallel between Supreme Court agenda-setting and government spending allocations across policy areas in budgetary research. As Lipsmeyer, Philips and Whitten (2017) argue, in order to better understand partisan budgetary behavior from the perspective of public policy trade-offs, it requires a consideration of how governments allocate their budgetary resources among the various policy areas. When altering spending on one policy area, governments are shifting resources and changing allocations across multiple policies. In other words, government ideology and partisan influences reflect trade-offs between policy areas.

This approach to understanding budget allocations is comparable to how the Supreme Court sets their agenda: just because the Court grants review to cases in one issue area does not necessarily result in taking cases away from another issue area. However, this is where the comparison to budgets becomes a little more challenging. With a budget, the total allocation has to sum to 1 (or 100 percent of the budget accounted for across policy areas). The United States Supreme Court is under no such constraint, due to their discretionary jurisdiction. But, the framework presented by Lipsmeyer, Philips and Whitten (2017) still applies. Changes in the partisan composition of the Court reflect changes in preferences for certain issues of cases, better accounting for the variation of issue attention over time.

The main independent variables in this analysis account for both internal and external ideology and partisanship. In order to account for ideology, I make use of Bailey's (2013) ideological preference estimates for the three branches of government. An advantage to using these scores is that they have facial validity (are comparable to other scores, though certainly distinct), evolve over time, and are comparable in space and time (permitting strategic institutional considerations). In order to account for partisan considerations, I use measures that indicate which party has control of the presidency, and each chamber of Congress. This measure takes on a value of one if Republicans are in power, and zero otherwise. The standard measure of partisanship on the Supreme Court is to use the party of the appointing president as a proxy for each justice's ideological predisposi-

tions. Rather than include another dummy variable, to account of the partisanship of the justices, I make use of a measure which captures the proportion of Republican president-appointed justices to Democrat-appointed justices.⁴

The expectation is that the trade-offs between issue areas reveals information about the preferences of the justices. Specifically, that when there is a higher proportion of Republican-appointed justices, the Court will allocate more resources to economic cases, particularly at the expense of criminal procedure and civil rights cases. In part, this reflects the idea that justices, despite being treated as ideologues instead of ideologues *and* elite partisans, care about the overall reputation of their party. Borrowing from the issue ownership literature, Republicans are more likely to be associated with economic issues and being tough on crime. Conversely, when the proportion of Republican-appointed justices to Democrat-appointed justices favors the Democrats, the Court is more likely to allocate resources to hearing civil rights and liberties cases. This is supported by the tendency of Democratic partisans to focus more on social welfare issues.⁵

To test my theoretical claim about issue area trade-offs, I draw on recent work that employs log-ratio transformations in order to model the four components of the agenda simultaneously (Lipsmeyer, Philips and Whitten; 2017; Philips, Rutherford and Whitten; 2015; Philips, Rutherford and Whitten; 2016a). As the four categories sum to one, modeling them together using standard regression models is highly problematic. To get around this, current models of compositional dependent variables use a strategy proposed by Aitchison (1982). This strategy involves taking the logged ration of $J - 1$ categories relative to an arbitrary “baseline” category, $j = 1$ (without loss of generality):

$$s_{itj} = \ln \frac{y_{itj}}{y_{it1}} \forall j \neq 1$$

The result of this stratey is that is “unbounds” the series from the zero-to-one space. This modeling strategy is prefereable to more complex alternatives, such as beta regression, since it

⁴This proportion ranges from zero to eight, with the modal proportion at 3.5.

⁵See Damore (2004); Petrocik (1996); and Petrocik, Benoit and Hansen (2004) for a more thorough treatment of issue ownership across political parties.

allows for the use of standard regression approaches for estimation (i.e., multivariate normal, or poisson), and obtain all results simultaneously once the $J - 1$ compositions are ‘un-transformed’ back into J categories post-estimation. In order to correct for, and take advantage of, likely correlations in the errors across equations, I estimate the equation defined below using a seemingly unrelated regressions procedure in order to gain more efficient estimates (Zellner, 1964).⁶ Here, I transform the four issue areas into three s_{ijt} log-ratio compositions and estimate the following model specification:

$$s_{ijt} = f(s_{it-ij} + SCid_{it} + Pid_{it} + HCid_{it} + Sid_{it} + Pp_{it} + HCP_{it} + Sp_{it} + PRepJ_{it} + \varepsilon_{ijt})$$

Where, s_{ijt} is the log-ratio of dependent variable category ‘ j ’ for $j > 1$ relative to baseline category $j = 1$ are time ‘ t ’ for Court i . s_{it-1j} is a lagged dependent variable. This is included to take into account that the Court’s agenda shifts incrementally over time, and there is no upper or lower bound on the number of cases the Court selects for review in any term. Another advantage of including a lagged dependent variable is the ability to obtain both short- and long-run effects of the independent variables. SC_{it} , Pid_{it} , HC_{it} , Sid_{it} are measures of ideology in the three branches of government; and Pp_{it} , HCP_{it} , Sp_{it} are measures of party control. $PRepJ_{it}$ is the proportion of justices appointed by Republican presidents.

4.6 Results

In order to get a better sense of the effects of internal and external ideological and partisan effects on the trade-offs between issue areas for Supreme Court agenda-setting, I estimated a compositional dependent variable model. Table 4.1 presents the estimates from a model with independent variables measuring partisanship and Table 4.2 presents the estimates from a model with indepen-

⁶As Philips, Rutherford and Whitten (2016a, p.272) note, the best approach for modeling compositional time series is through error correction models (ECMs). And ECMs within the `dynsimpie` (Philips, Rutherford and Whitten, 2016b) approach use SUR for two main reasons. First, the dependent variable values, y_{tij} , are measured at the same time for the spatial unit and must sum to 1; an overestimate of one constitute part results in an underestimate of another. Second, they argue that researchers should use the same regressors to model each compositional outcome of interest and have reason to believe that contemporaneous correlation of the errors may be present.

dent variables measuring ideology. The first two columns of results display the estimated short-run and long-run effects of each independent variable on the logged ratio of criminal procedure cases to civil rights cases, followed by the estimated effects for the logged ratio of economic cases to civil rights cases, and finally the estimated effects for the logged ratio of judicial power cases to civil rights cases. Together, these six columns depict the results from a single estimation of the system of equations when I estimate the models with civil rights as the baseline category.⁷

As we can see from Table 4.1 and Table 4.2, the estimation of even a relatively parsimonious model yields a fairly extensive set of estimated nonlinear effects. From these results, however, there are a few general observations. First, when comparing the criminal procedure to civil rights results with the economic to civil rights results and the judicial power to civil rights results, it appears that these estimated relationships are, for many variables, quite different across equations. This indicates that civil rights losses do not evenly distribute across the four main issue areas.

Independent Variable	$\ln(\frac{CriminalProcedure}{CivilRights})$		$\ln(\frac{Economic}{CivilRights})$		$\ln(\frac{JudicialPower}{CivilRights})$	
	Short	Long	Short	Long	Short	Long
Prop. Republican Appt. Justices	-0.18**	-0.04	-0.15**	-0.12**	-0.14**	-0.11**
Party of President	0.12	0.22	0.08	0.24*	0.20	0.15
Party Control House	0.34*	0.13	0.38*	0.14	-0.005	-0.04
Party Control Senate	0.08	-0.06	0.10	-0.03	0.04	0.05
$\hat{\alpha}$	-0.82**		-0.64**		-0.88**	
Constant	0.17		0.41**		0.12	
N	60		60		60	
R^2	0.53		0.43		0.50	

Note: Dependent variable is the logged ratio of the number of cases in the top issue area to the bottom issue area. Estimated effects are from a seemingly unrelated regression model with error correction specifications to model both short-run and long-run effects.

Long-run effects are calculated by $LR = \frac{\beta_{Lj}}{-\alpha_j}$ using the delta method.

* $p < .10$ ** $p < .05$ (two-tailed Wald χ^2) tests

Table 4.1: Estimated Short-Run and Long-Run Effects of Partisanship Variables on Supreme Court Agenda Composition

⁷As Philips, Rutherford and Whitten (2016a) explain, the selection of a baseline category is completely arbitrary. The results from the models should be the same regardless of which issue area constitutes the baseline category. I selected civil rights as the baseline because of my expectation that an increase in the proportion of Republican-appointed justices would lead to a decrease in judicial attention to civil rights issues.

Independent Variable	$\ln(\frac{CriminalProcedure}{CivilRights})$		$\ln(\frac{Economic}{CivilRights})$		$\ln(\frac{JudicialPower}{CivilRights})$	
	Short	Long	Short	Long	Short	Long
Prop. Republican Appt. Justices	-0.19**	-0.09	-0.05	-0.06	-0.12**	-0.08*
SC Ideology	-0.21	-0.39*	0.03*	-0.21	-0.37	-0.44**
President Ideology	-0.10	0.18*	-0.13	0.09	-0.05	0.18*
House Ideology	-0.28	0.97**	-0.02	0.90**	0.26	0.68**
Senate Ideology	0.05*	-1.03**	0.48	0.01**	0.02	-0.24
$\hat{\alpha}$	-0.97**		-0.88**		-1.11**	
Constant	0.71**		0.56**		0.22	
N	60		60		60	
R^2	0.58		0.51		0.57	

Note: Dependent variable is the logged ratio of the number of cases in the top issue area to the bottom issue area. Estimated effects are from a seemingly unrelated regression model with error correction specifications to model both short-run and long-run effects.

Long-run effects are calculated by $LR = \frac{\beta_{Lj}}{-\alpha_j}$ using the delta method.

* $p < .10$ ** $p < .05$ (two-tailed Wald χ^2) tests

Table 4.2: Estimated Short-Run and Long-Run Effects of Ideology Variables on Supreme Court Agenda Composition

Additionally, because of the error correction model specification, each change in an independent variable has both short-run and long-run effects. The assessments of statistical significance for the estimated short-run relationships involve straightforward tests on a single-parameter estimate, but the assessments of the long-run relationships are slightly more complicated given the multiple parameter estimates. From Table 4.1 and Table 4.2, the estimated effects are statistically significant at conventionally accepted levels for different relationships in both short-run and long-run specifications. In the partisanship model, the composition of the Court's agenda does not appear to be as influenced by the prevailing partisanship (in terms of which party is in power) within the other branches of government. Which party controls the Senate is not a significant predictor of Supreme Court issue attention, and party control of the House only has short-run effects for comparing criminal procedure and economic issues to civil rights issues. Further, the party of the president is only significant when examining the trade-off relationship between economic and civil rights issues. Conversely, in the ideology model, when accounting for the median ideology on the Supreme Court, the ideology of the other branches of government has more of an effect. There is

a long-run relationship between agenda composition and the median ideology of the House across all issue area comparisons, and a long-run relationship between median ideology of the Senate and agenda composition in two of the three issue area comparisons. The different effects from these models indicate that partisanship and ideology have separate influences on Supreme Court agenda setting.

Perhaps the strongest estimate from this model is the persistent short-run and long-run effect of the proportion of Republican-appointed justices. This effect is negative and statistically significant across both models, suggesting that if another Republican president appoints a new justice, there will be some amount of decay, but also some persistence of conservativeness moving forward. However, the effect is more persistent in the partisanship model where the only non-statistically significant relationship is the long-run effect comparing criminal procedure issue attention to civil rights issue attention. However, in the ideology model, For example, when Donald Trump was elected president in 2016, because the Republicans in the Senate had stymied President Obama's appointment of Merrick Garland to fill Justice Scalia's vacant seat, a Republican president was able to make the nomination to fill the gap left on the Court by justice nominated by another Republican president. The proportion of justices appointed by Republican-presidents to those appointed by Democratic presidents did not change. Therefore, we should not expect to observe a change in the proportion of economic cases granted review relative to the other issue areas. However, if President Obama's nomination had been successful in nominating Judge Garland, the proportion would have shifted to favoring justices appointed by Democratic presidents. And that shift in the proportion of Republicans to Democrats would create an expectation that the trade-off between issue areas would shift.

With this modeling strategy, any change in the value of an independent variable has multiple short- and long-run effects on the relative shares of the categories of the dependent variable. Because of these reasons, Philips, Rutherford and Whitten (2016a) recommend the use of dynamic simulations for a more intuitive interpretation of results. I use the Stata program `dynsimple` to produce expected values of the proportion of judicial issue attention across the four issue categories

in response to a counterfactual increase in the proportion of Republican-appointed justices Philips, Rutherford and Whitten (2016b). The program first creates 1000 parameter estimates using Clarify (Tomz, Wittenberg and King, 2003), which come from the coefficients and covariance matrix from the estimated model. At $t = 1$, it then sets all lagged dependent variables to their sample means, the first difference and lag of Republican-appointed justices, x_{t-1}^* , to zero and its sample means, respectively; the same is done for the other variables. Then the program generates expected values, which become the new value of the lagged dependent variable. At time $t = 3$, the program introduces a counterfactual one-period shock into the system through variable x_t^* (proportion of Republican-appointed justices in my example).⁸ The lag of all other variables remain at their sample means, and their first-differences at zero, effectively rendering them “all else equal”. The counterfactual shock first appears in the first difference of x_t^* , then the lag of x_t^* when $t = 4$. The resulting predictions are then “untransformed” and plotted as short- and long-run changes from starting values.

In Figure 4.2 I plot the results of a Republican-appointed justice shock on the composition of the Court’s agenda by simulating a one standard deviation increase in composition of the bench. The horizontal axis is the expected change in agenda space for each of the four issue areas (expressed as a change in the proportion of total issues on the agenda from the sample means scenario). The short-run effect are the instantaneous expected change in the composition of the Court’s agenda in response to an increase in the proportion of Republican-appointed justices on the bench. The long-run effects show the accumulated change in each issue area over time. In other words, they show the estimated total effect of a one standard deviation increase in Republican-appointed justices on agenda composition. Each effect is displayed with a 95% confidence interval.

There is one statistically significant short-run change as a result of an increase in the proportion of Republican-appointed justices, for judicial power cases. These gains appear to come from a decrease in civil rights cases more than from economic or criminal procedure issues. However, in the long-run, we observe more statistically significant changes in agenda composition. Specifically,

⁸The shock is introduced at $t = 3$ because the average length of a natural court (a period where there is no change in the personnel on the bench) is just under three years for my sample.

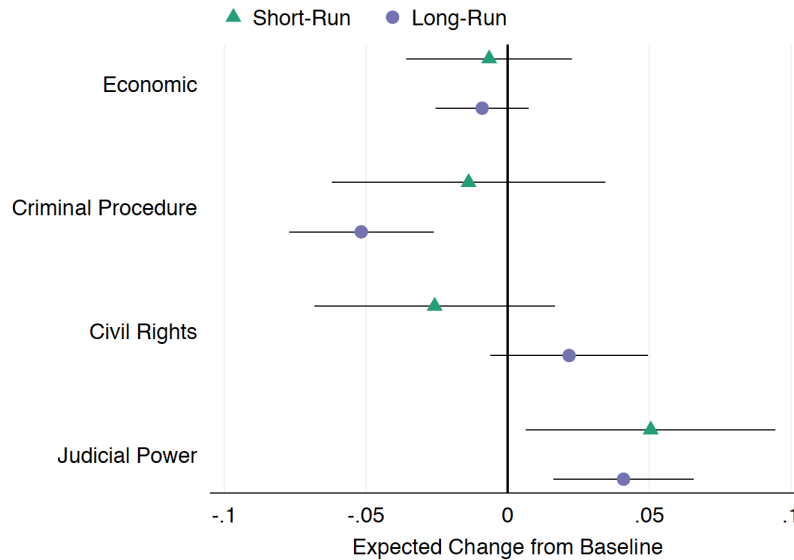


Figure 4.2: Effects of an Increase in the Proportion of Republican-Appointed Justices on the Supreme Court's Agenda-Partisanship

when the proportion of Republican-appointed justices increases, there is a decrease in attention to criminal procedure cases and an increase in both civil rights and judicial power cases. The immediate decrease in civil rights issue attention is in line with my expectations, but the long-run increase in attention to this issue domain is interesting because it indicates that the Court does not permanently reduce their attention to civil rights issues over time. Note that we would be unable to see this non-uniform change in other issue areas if using standard approaches to analyzing agenda setting, such as examining one issue area at a time or certain types of cases (e.g., abortion or free speech).

A simulation of the same counterfactual one standard deviation increase in the proportion of Republican-appointed justices on issue attention is presented in Figure 4.3, this time focusing on measures of ideology rather than partisanship. Although there are no statistically significant long-run changes, there are significant trade-offs between civil rights and judicial power issues in the short-run. It is worth noting that the overall pattern in short-run changes is similar between the models of ideology and partisanship. However, the short-run changes in space on the agenda

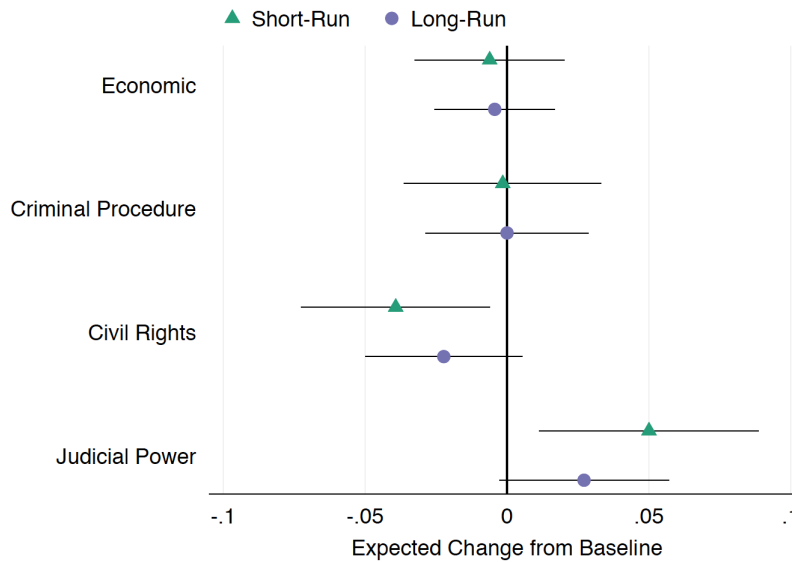


Figure 4.3: Effects of an Increase in the Proportion of Republican-Appointed Justices on the Supreme Court's Agenda—Ideology

for criminal procedure and economic cases is even less distinguishable from the mean, and both civil rights and judicial power have a statistically significant effect. Similar to partisanship, when accounting for ideology, there is an increase in attention to judicial power cases, and a decrease in attention to civil rights cases immediately preceding the appointment of a new justice by a Republican president. As with partisanship, the increase in agenda space to judicial power cases comes mostly at the expense of civil rights issues.

Overall, my expectations for which types of issues should receive more attention with more Republican-appointed justices on the bench were not born out. There is almost no change in attention to economic issues when there is an increase in Republican-appointed justices in either the partisanship or ideology model. And less attention is given to criminal procedure issues, especially in the long-run within the partisanship model, and there is no significant change under the ideology model. My expectation that there would be fewer civil rights issues addressed by a more Republican bench are supported across both models in the short-run. But, the trade-off is not what I had expected. Judicial power issues gain more space on the agenda at the expense of the other

issue areas.

Further, these results indicate that there are similar effects of partisanship and ideology on judicial issue attention. However, the short-run and long-run relationships have different directions and the magnitude of these effects are not the same for partisanship and ideology. Specifically, the long-run increase in civil rights under the partisanship model suggests that Court's with more Republican-appointed justices have different motivations for allocating attention to civil rights cases than when only ideology is considered. Perhaps Court's with more Republican-appointed justices are looking to overturn decisions from previous Court's with a different proportion of Republicans to Democrats. Future research on precedent vitality might provide a more thorough explanation of the increased attention to civil rights issues over time. This result could also indicate that partisanship is tapping into residual loyalty between justices and their appointing presidents while both the president and the justice are serving in their respective institutions concurrently (i.e., Epstein and Posner, 2016). Additionally, the positive increase in civil rights and judicial power at the expense of criminal procedure might explain the relative policy preferences of different presidents and Congress', which speaks to understanding how the Court responds to the other branches of government in a separation of powers context.

4.7 Conclusions and Future Directions

Across a broad range of subfields, researchers theorize about political trade-offs and what shapes them over time. For scholars interested in explaining decision-making, agenda-setting provides a particularly rich area in which to examine political trade-offs as agenda-setting involves political actors making trade-offs between various interests, groups, and priorities. While previous scholars have acknowledged this framework for electoral, legislative, and judicial behavior, few have actively tackled these relationships either theoretically or empirically. The application of a relatively new empirical strategy for testing and modeling compositional variables to a context outside of party support (Philips, Rutherford and Whitten, 2016a) and political budgeting (Lipsmeyer, Philips and Whitten, 2017), simultaneously demonstrates the utility of this approach and provides for a more holistic picture of judicial decision-making. I find that the partisan composition of the

Supreme Court affects the amount of issue attention given to cases within different issue areas.

Specifically, I advance work on judicial agenda-setting in two important ways. First, I theoretically and empirically model judicial behavior on agenda compositions over time, taking into account the trade-offs between issue areas. While focusing on one or two issue area improves our insights on those areas, I argue that the approach of acknowledging that increasing (or decreasing) agenda space for some issue areas can limit (or improve) the ability to add cases to the agenda from other issue areas. Second, I incorporate both partisan and ideological preferences, rather than treating all preferences as expressions of ideology. Taken together, I focus on understanding how these trade-off relationships between issue areas informs our understanding of issue variation on the Supreme Court and conditions under which certain issues are more likely to be addressed by the Court.

The work here offers many avenues for future exploration. How political actors trade-off policy priorities involves questions of government responsiveness, and combining the idea of issue ownership on the Supreme Court as well as in the other branches of government will be important for understanding strategic government behavior, particularly in a separation of powers context. In future work, there are a number of ways in which I can better incorporate the effects of partisanship on Supreme Court decision-making, such as considering the types of issues presented as bills and signed into laws by Congress. Further, considering judicial agenda-setting from a compositional approach allows for a more thorough exploration of the relationship between the public's perception of salient issues and the issues areas represented on the Court's agenda, to extend the literature on public opinion and judicial decision-making.

5. CONCLUSIONS, IMPLICATIONS, AND FUTURE WORK

The preceding sections have laid out a macro-political theory of issue attention, and the importance of considering dynamic linkages for a complete understanding of agenda setting. The results indicate that issue attention by the U.S. Supreme Court is not merely the result of the incidental aggregation of the policy domains in which individual cases are situated. The Court's attention to economic issues is systematically associated with macro-political dynamics in the ideological orientations of the Court's members and the state of the national economy. This mirrors patterns of aggregate issue attention in the elected branches of national government and highlight a political economy of judicial issue attention. Additionally, the results from the analysis of variation in attention to criminal procedure issues demonstrate the influence of issue salience within the public and other political institutions as predictors of judicial attention to resolving questions within this policy domain. Together, these results provide a more complete picture of the relationship between the U.S. Supreme Court and the broader dynamics of the American political system. They are likewise further evidence of ordinary political motives at play along with legal factors in the behavior of Supreme Court justices.

Further, this dissertation advances the work on judicial agenda-setting in two important ways. First, by theoretically and empirically model judicial behavior on agenda compositions over time, the research here explicitly takes the trade-offs between issue areas into account. Focusing on one or two issue areas does improve our insights on those areas, however, this dissertation argues that the approach of acknowledging that increasing (or decreasing) agenda space for some issue areas can limit (or improve) the ability to add cases to the agenda from other issue areas. In other words, focusing on individual case-level considerations falls short of actually capturing the dynamic linkages in the agenda-setting process. Second, this dissertation incorporates both partisan and ideological preferences, rather than treating all preferences as expressions of ideology. Taken together, focusing on understanding how these trade-off relationships between issue areas informs our understanding of issue variation on the Supreme Court and conditions under which certain

issues are more likely to be addressed by the Court.

The theory and evidence presented here, of course, can be improved. Chief among the concerns is the lack of data on the pool of potential cases from which the justices can set their agenda. Or, there is no comprehensive database which contains all petitions for a writ of certiorari filed from each of the U.S. Courts of Appeals, with an indication of whether a petition was granted or denied. The Blackmun Archive (Epstein, Segal and Spaeth, 2007) provides insight into how the justices go about selecting cases, but only for a limited time. Additionally, Songer (2006) coded a random sample of petitions from the U.S. Courts of Appeals that were denied certiorari during the Burger Court (1969-1985), alongside the petitions that were granted and placed on the agenda. Having a random sample of denied petitions is useful for seeing what types of cases were granted and what were denied, but the random sample provides an incomplete picture of the full menu of cases and does not help answer the question of which issue areas lose out and when. The compilation of a comprehensive certiorari database containing information on all cases appealed is a fruitful avenue for future work, which will greatly expand our understanding of agenda setting dynamics on the Supreme Court, at both the micro- and macro-political levels. And, having access to the cases that were denied certiorari relative to the ones granted generates additional questions that can be explained. Specifically, are some circuits more successful than others at receiving a grant? Is that circuit success issue specific or are there temporal patterns (i.e., some circuits being more successful than others at different points in time)? Content analysis of the granted cases versus the denied cases will also inform our understanding of what makes a case certworthy on a micro-level, while also speaking to patterns of issue attention and doctrinal development on a macro-level.

Other estimation strategies could be used. There are a few points where the models are reported that, although they illuminate “first cuts” at the empirical relationships among the variables, they do a relatively poor job of accounting for some of the finer time-serial qualities of the estimation at hand. In particular, the models presented in Sections 2 and 3 are distributed lag models. While these models are a good first step in determining the temporal patterns that persist across time, they tend to produce rather “noisy” estimates with larger standard errors and take up too many de-

degrees of freedom. One refinement to this estimation strategy is to make sure of a finite distributed lag, or Almon estimator. This modeling strategy imposes a shape on the lag distribution to reduce the effects of collinearity, where the shape of the distribution of lag coefficients through time is determined by a polynomial of order P (Almon, 1965). Not only would this strategy reduce the potential of multicollinearity among the predictors, but it would also increase the degrees of freedom and produce smaller standard errors, with more precise coefficient estimates. An alternative strategy is to use a partial adjustment model, which is comprised to two parts: a static part to describe how the desired amount is determined and the dynamic partial adjustment process. With a partial adjustment model, the analysis in Sections 2 and 3 would provide a cleaner explanation of the agenda setting process. The static component would be the amount of issue space allocated to different policy areas on the Court's agenda (e.g., economic and criminal procedure), as a function of the dynamic changes in the political environment, issue salience, Congressional bills related to the issue area, and Court composition.

Additionally, there is a real concern about multicollinearity in the models presented in Sections 2 and 3, and the muting or under-estimation of the effects of changes in the real economy and political environment on issue salience and case selection. Structural Equation Models could be used to help better account for the sequencing of the agenda setting process represented in these sections. Making use of a comprehensive database on the success or failure of certiorari petitions will improve our understanding of the agenda setting process. By being able to model the decision to appeal for certiorari as a necessary condition for receiving a grant of certiorari as structural equations will clarify the temporal sequencing and order of the agenda setting process. Also, because my theory articulates that the political environment and issue salience independently influence Supreme Court issue attention, but the political environment also influences perceptions of issue salience, mediation analysis would be a better way to explore the effects of the political environment as an independent predictor and as a predictor working through issue salience.

Further, difference-in-difference models could help to account for the reduction in overall agenda space since 1986. Another aspect of the composition of the agenda is the size. There

is no doubt that the justices have more than enough options to choose from when setting their agenda. However, the number that it ultimately grants review in has dropped markedly across time. What explains, then, why the Court's docket is shrinking? Owens and Simon (2012) contend that a combination of internal and external influences explains this decline including the average circuit distance from the Supreme Court ideologically, and the passage of the Case Selections Act of 1988. Using a difference-in-difference model would allow for a cleaner test of Owens and Simon's explanations. One avenue for future work would be to take an issue area not related to economic issues, such as free speech, and compare the behavior of the Court to this issue area relative to economic issue area in terms of the proportion of allocated agenda space. Another avenue for future work using this estimation strategy would be to have fixed indicators for the Chief Justice as a stable preference for that term, and determine which trends are emerging pre- and post-1988 in the political environment and public issue attention that are independent of the Chief's preferences.

Another venue for understanding the dynamics of agenda-setting is to extend Baird's (2004,2007) important work on the Court's influence in attracting cases. Her work overturned the conventional wisdom that the Court must be a passive institution, idly waiting for an issue to reach its doors. Instead, she demonstrated that the Court can exert authority not only over the cases they choose, but the pool of potential cases to choose from in future terms by issuing "salient" decisions in a particular area. Work in recent years has, however, significantly expanded the options available to scholars seeking a salience measure. Collins and Cooper (2012), for example, expand upon the path-breaking work of Epstein and Segal (2000) and generate a quasi-continuous measure of case salience (see also Clark, Lax, & Rice, 2015). Other researchers take a different approach and attempt to identify what the justices themselves (as opposed to newspaper editors) think is salient. In this vein, Black, Sorenson, and Johnson (2013) look to how the justices behave during oral argument as an indicator of the justices' interest in a given case. A logical and interesting extension may, for example, seek to examine how responsive litigants are to case-specific signals sent by the justices.

I close with the following observations. The agenda-setting process itself has evolved quite

significantly over time, and agenda-setting provides a useful window into judicial behavior and a fruitful ground for theory testing. Because of the lack of readily available data, this is an area in which scholarship can continue to grow and expand. Specifically, agenda setting can and should be used as a bridge to other literatures within judicial politics and beyond. One readily available extension concerns the increase in partisan polarization in Congress. As polarization continues to result in congressional gridlock and a stymied policy process, Americans must turn to alternative venues for policy change. The Supreme Court and federal judiciary has been a popular alternative, especially for social change. However, as the size of the Court's agenda continues to dwindle, research on agenda setting is pertinent to understanding why the Court may opt to decide certain issues, yet decline to hear others, and continue to uncover the layers of decision making that go into the construction of the Court's agenda. The theory articulated throughout and methodological approach presented in Section 4 provides a first step in connecting issues to the Supreme Court and explaining how the trade-off relationships that structure political decision-making and issue attention explain judicial behavior. By understanding how the Supreme Court relates to the other branches of government, we have a better understanding of the dynamics of agenda setting in political institutions.

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